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ALEXANDER L. STEVAS,
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83-2036

No.

In The Supreme Court of the United States

October Term, 1983

ANTHONY RABITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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130 pp

QUESTION PRESENTED

Whether the court below should have reversed the conviction of petitioner for non-RICO offenses pursuant to the doctrine of prejudicial spillover announced by this Court in *Kotteakos v. United States*, 328 U.S. 750 (1946), where the racketeering charges against the petitioner were not sustained and the evidence presented against petitioner was entirely circumstantial while the jury was presented with highly prejudicial and inflammatory evidence concerning his co-defendants' alleged racketeering activities such as murders and hijackings?

THE PARTIES BELOW

Petitioner, together with Benjamin Ruggiero, Nicholas Santora, and Antonio Tomasulo, appealed a judgment of conviction to the United States Court of Appeals for the Second Circuit.*

*Petitioner was convicted of offenses under 21 U.S.C. §841 and 21 U.S.C. §846. Benjamin Ruggiero and Antonio Tomasulo were convicted under 18 U.S.C. §1962(d). Nicholas Santora was convicted of offenses under 18 U.S.C §1962(d) and (c), and 21 U.S.C. §846. The Court of Appeals for the Second Circuit affirmed the convictions of petitioner and Benjamin Ruggiero. The conviction of Nicholas Santora for violations of 18 U.S.C. §1962(c) and 21 U.S.C. §846 was also affirmed. The convictions of Nicholas Santora and Antonio Tomasulo for a violation of 18 U.S.C. §1962(d) were reversed.

TABLE OF CONTENTS

Page

Question Presented i

The Parties Below ii

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

Reasons for Granting The Writ 6

Conclusion 15

Appendices 1a

TABLE OF AUTHORITIES

Cases: *Page*

Kotteakos v. United States, 328 U.S. 750 (1946) 7 7,8,12,14,15

Schaffer v. United States, 362 U.S. 511 (1960) 15

United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) 8,9,15

United States v. Bledsoe, 674 F.2d 647 (8th Cir.), *cert. denied*, 103 S.Ct. 456 (1982) 12

United States v. Borelli, 435 F.2d 500 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971) 9

United States v. Cambindo Valencia, 609 F.2d 603 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980) 10

United States v. DeRosa, 670 F.2d 889 (9th Cir.), *cert. denied*, 103 S.Ct. 353, 372 (1982) 7

United States v. Elliot, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) 8, 12

United States v. Guiliano, 644 F.2d 85 (2d Cir. 1981) 7,13,14

United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) ... 14

United States v. Magnano, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) 9

United States v. Miley, 513 F.2d 1191 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975) 10

United States v. Napolitano, 564 F. Supp. 951 (S.D.N.Y. 1982) 6, 9, 14

United States v. Ong, 541 F.2d 331 (2d Cir. 1976), *cert. denied*, 430 U.S. 934 (1977) 11

United States v. Ruggiero, 726 F.2d 913 (2d Cir. 1984) 6

United States v. Sam Goody, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982) 13, 14

United States v. Weisman, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980) 12

United States v. Welch, 656 F.2d 1039 (5th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) 12

Statutes

18 U.S.C. §1962 3

21 U.S.C. §841 3

21 U.S.C. §846 4

28 U.S.C. §2106 ..... 13, 15

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

ANTHONY RABITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Anthony Rabito ("Rabito") petitions for a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit which affirmed a judgment of conviction made by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The United States District Court for the Southern District of New York issued a published opinion dated July 15, 1982 which denied various pre-trial motions of the defendants. The citation for the opinion is *United States v. Napolitano,* 552 F.Supp. 465 (S.D.N.Y. 1982).

The district court issued a published opinion dated November 12, 1982 which denied the post-trial

motions of petitioner and one of his co-defendants, Antonio Tomasulo, for acquittal, or in the alternative for a new trial. The citation for this opinion is *United States v. Napolitano,* 564 F.Supp. 951 (S.D.N.Y. 1982).

The United States Court of Appeals for the Second Circuit issued a published opinion dated January 18, 1984. The court of appeals affirmed the decision of the district court as to petitioner's motion for a new trial. The citation for this opinion is *United States v. Ruggiero,* 726 F.2d 913 (2d Cir. 1984).

Jurisdiction

The judgment of the court of appeals affirming the decision of the district court as to petitioner's motion for a new trial was dated and entered on January 18, 1984.

On April 12, 1984 the court of appeals issued an order denying Rabito's petition for a rehearing.

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

Statutes Involved

21 U.S.C. §846

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt

or conspiracy.

28 U.S.C. §2106

§2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. 1254

§1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

***

18 U.S.C. §1962 Prohibited activities

21 U.S.C. §841 Prohibited Acts A

Statement of The Case

Petitioner was charged with participating in a conspiracy to violate 18 U.S.C. §1962(d) ("RICO"); distribution and possession with intent to distribute methaqualone in violation of 21 U.S.C. §§841(a)(1) and

(B)(1)(a), and conspiracy with intent to distribute methaqualone in violation of 21 U.S.C. §846 in a four count indictment together with nine co-defendants. The predicate acts charged in the indictment for petitioner's RICO conspiracy count were: a) three conspiracies to murder; b) a conspiracy to attempt to murder; and c) a conspiracy to distribute methaqualone in the Southern District of New York.

Petitioner was prosecuted along with four other defendants in a trial which lasted six weeks. At the conclusion of the government's case, the district court dismissed the three murder conspiracies alleged against petitioner as predicate acts of the RICO conspiracy. The jury acquitted petitioner of the RICO conspiracy and convicted him on the two methaqualone counts.

The evidence presented against petitioner as to his involvement in quaalude transactions was entirely circumstantial and consisted of the following: tapes containing conversations pertaining to tablet transactions, but which had no mention of the word quaalude; the "expert" testimony of an FBI agent as to the nature of telephone conversations of persons engaged in drug transactions; and the testimony of another FBI agent as to observations he made of petitioner leaving his apartment and meeting with unknown individuals in restaurants. A laboratory report was entered into evidence which established that pills marked "714 Lemmon" seized from the only defendant besides petitioner who was named in his quaalude conspiracy count did not contain a controlled substance.

A conspiracy to distribute quaaludes in the

Eastern District of New York was included as a predicate act of the RICO offenses charged against petitioner's four co-defendants who stood trial. Petitioner was not charged with participation in that quaalude conspiracy. The only pills containing methaqualone introduced into evidence at the trial pertained solely to this Eastern District conspiracy. There was also direct testimony as to the participation of petitioner's four co-defendants, but not of petitioner, in the distribution of methaqualone.

All five defendants were charged with conspiracy to violate RICO. In addition, three of petitioner's co-defendants were charged with substantive RICO offenses. The various predicate acts alleged to have been performed or engaged in by some or all of the defendants to further the enterprise included three murders, one attempted murder, truck hijackings, armed robbery conspiracies, and gambling operations.

The centerpiece of the trial was the testimony of Joseph Pistone, a Special Agent of the FBI. Pistone described how, using the name Don Brasco, he infiltrated the Bonnano crime family to the extent that he was even nominated for membership in the family. Pistone stated that he was in constant contact with various members of the family, especially with one of petitioner's co-defendants, Benjamin Ruggiero, whom he spoke to at least several times a week for a period of three years. Much of the evidence concerned the three murders which were dismissed as predicate acts for petitioner's RICO count at the conclusion of the government's presentation.* Yet Special Agent

* Petitioner offers the following as examples of the type of testimony which was not related to him, yet could not have failed to prejudicially influence the jury against him in its deliberations

Pistone, who testified as to his knowledge of numerous family members and his involvement with them, admitted that his familiarity with the petitioner was limited to a mere introduction.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Second Circuit, in dismissing petitioner's claim that he is entitled to a new trial in the interests of justice because of the prejudicial spillover of the RICO count into the jury's deliberation on the barely sufficient evidence of the non-RICO counts for which he was convicted, affirmed without comment the district court's decision denying petitioner's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. *United States v. Ruggiero,* 726 F.2d 913, 925 (2d Cir. 1984). The district court essentially held that Rabito had not demonstrated substantial prejudice. *United States v. Napolitano,* 564 F.Supp. 951, 954 (S.D.N.Y. 1982).

The taint of a RICO allegation may result in pre-

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on the non-RICO counts. Special Agent Pistone testified that one of petitioner's co-defendants, Benjamin Ruggiero, said:

> [T]here were four people in on the hit, and he said that he had the Trin (Bonanno captain Dominick Trinchera) in on it, that he was all cut up, that he tried to move him but he couldn't and he was amazed how strong Boobie (one of petitioner's co-defendants, John Cerasini) was, because Boobie was able to move him.

Special Agent Pistone testified that he asked another one of petitioner's co-defendants, Nicholas Santora, how they managed to move Trinchera. Santora replied, "you should have seen when they shot him, fifty pounds of stomach went flying." This shocking testimony together with the direct proof of petitioner's co-defendants' participation in drug transactions created a danger of guilt by association.

judicial spillover necessitating the reversal of a conviction for a non-RICO offense at the same trial. *United States v. Guiliano,* 644 F.2d 85 (2d Cir. 1981); *cf., United States v. DeRosa,* 670 F.2d 889, 897 (9th Cir.), *cert. denied,* 103 S.Ct. 353, 372 (1982). The doctrine of prejudicial spillover was promulgated by this Court in *Kotteakos v. United States,* 328 U.S. 750 (1946). In *Kotteakos* the defendants were convicted of a single conspiracy when the proof demonstrated the existence of eight or more separate conspiracies. The Court reversed the defendants' convictions and held that the material variance between the indictment and the proof at trial prejudiced their substantial rights to have the jurors consider their guilt individually. *Kotteakos,* 328 U.S. at 775.

The harm to an individual's rights which was found in *Kotteakos* resulted from a joint trial where evidence of a "conglomeration of distinct and separate offenses committed by others" was presented. *Id.* In reversing the convictions of the defendants, Mr. Justice Rutledge declared that "[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Id.* at 774.

The right of a defendant to have the jury consider his guilt individually is at the root of our criminal justice system.

> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or effi-

> ciency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

Id. at 750.

The violation of this right will necessitate reversal when it is probable that the variance between the indictment and the proof influenced the jurors' deliberations regardless of whether convictions would be obtained in separate trials. *Id.* at 776. Indeed, the *Kotteakos* principle that guilt must be "individual and personal", *Id.* at 772, is so fundamental that it has been interpreted to be of Constitutional dimension. *United States v. Elliot*, 571 F.2d 880, 903, 905 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

Where several conspiracies are proven at a trial for a single conspiracy, a new trial will be ordered on the basis of prejudicial spillover when the defendants are forced to tolerate the presentation of weeks of evidence relating to conspiracies in which they played no role. *United States v. Bertolotti*, 529 F.2d 149, 157 (2d Cir. 1975). The court, taking a practical view of prejudicial spillover, stated:

> The prejudicial effect, however, of requiring the jury to spend two entire days listening to obviously shocking and inflammatory discussions about assault, kidnapping, guns and narcotics cannot be underestimated. No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed.

Id. at 158.

Petitioner was similarly subjected to a deluge of inflammatory evidence for crimes in which he took no part. The absence of proof connecting petitioner with the murders is manifested by the trial court's removal of those charges as predicate in his RICO conspiracy count. These crimes were substantially different in character from the offenses for which he was convicted.

The district court decision (which was summarily affirmed as to petitioner by the court of appeals, relying upon *United States v. Borelli,* 435 F.2d 500 (2d Cir. 1970), *cert. denied,* 401 U.S. 946 (1971), simply stated that Rabito had not demonstrated substantial prejudice, but pursuant to *United States v. Magnano,* 543 F.2d 431 (2d Cir. 1976), *cert. denied,* 429 U.S. 1091 (1977), had only asserted that he would have fared better at a separate trial. *Napolitano,* 564 F.Supp. at 954. An analysis of the facts of petitioner's case and of *Borelli* and *Magnano* demonstrates that substantial prejudice should be inferred from the circumstances presented by petitioner's trial.

In *Borelli,* two allegations of prejudice were made. It was first claimed that governmental economy was not a proper justification for the joint trial. In addition, it was proposed that the joint trial hindered Mr. Borelli's attempts to challenge the credibility of one of the witnesses for the prosecution. *Borelli,* 435 F.2d at 502-503. In *Magnano,* the defendants were all participants in a typical narcotics conspiracy. *Magnano,* 543 F.2d at 433. Therefore, there was no material disparity between the conspiracy charged and the proof. *Id.* at 435 fn. 2. Neither *Borelli* nor *Magnano*

presented a factual situation remotely resembling *Kotteakos*.

Unlike the defendants in *Borelli* and *Magnano*, the petitioner's trial presented the precise type of danger from prejudicial spillover which led to the reversal of the guilty verdicts in *Kotteakos*. The proof at trial demonstrated that only a minor role in the RICO conspiracy was attributed by the government to petitioner. The disparity between the indictment and the evidence presented against petitioner was apparent from the trial court's dismissal of three of the five RICO predicate acts charged against him and his acquittal on the RICO count. Furthermore, the evidence presented against petitioner as to his non-RICO counts was only a minute percentage of the total evidence adduced at trial and was entirely circumstantial. A concrete demonstration of substantial prejudice is not required; prejudice may be inferred from the circumstances. *United States v. Cambindo Valencia*, 609 F.2d 603, 625 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). A spillover effect may be inferred when a minor participant in one conspiracy was subjected to a trial at which weeks of damaging evidence relating to another conspiracy was presented. *United States v. Miley*, 513 F.2d 1191, 1209 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975).

A large quantity of evidence concerning entirely separate acts and defendants admitted pursuant to a conspiracy count creates a danger of prejudicial spillover onto the jury's consideration of substantive counts. *Cambindo Valencia*, 609 F.2d at 625. The RICO count created the same danger to petitioner. In a case involving the issue of whether the spillover of evidence relating to a single conspiracy influenced the

jury in its consideration of the scant evidence of the substantive counts relating to a co-defendant, it was stated that:

> It is improbable, however, that the evidence concerning the nefarious reputation of Ong or any mention of the subjects presently complained of and discussed infra would have played any role in a trial of Young alone. Nor is it likely that the government would have been permitted to introduce the multitude of tapes concerning solely the other defendants in which they literally convicted themselves out of their own months. These facts, when added to the prejudice inherent in any multi-defendant trial, make it possible that Young's relationship to the other defendants, by reason of his physical presence in the courtroom, injected an element of guilt by association into the jury's deliberations.

United States v. Ong, 541 F.2d 331, 338 (2d Cir. 1976), *cert. denied*, 430 U.S. 934 (1977).

The evidence presented as to the acts of petitioner's co-defendants was inherently prejudicial to him. The prejudice derived from the variance between the character of the acts as well as the nature and quantity of such evidence in comparison to petitioner's non-RICO counts and the evidence presented thereunder.

Courts should be especially vigilant to guard against the possibility of prejudicial spillover when, as here, the admission of a deluge of inflammatory proof of unrelated acts commited by defendants unconnected to the defendant's substantive offense counts was made possible by a RICO allegation which was not ultimately sustained against him. Ordinarily it is error for multiple conspiracies to be charged in a

single indictment. *Kotteakos,* 328 U.S. 750. However, RICO permits a wide range of people who have a minimal connection to each other to be charged in a single indictment. *See, United States v. Welch,* 656 F.2d 1039 1052 (5th Cir. 1981), *cert. denied,* 456 U.S. 915 (1982). RICO may be used as a vehicle to circumvent the obstacle posed by *Kotteakos* to the prosecution of a "wheel conspiracy" in a single indictment. *Elliot,* 571 F.2d at 902. The RICO predicate acts need not be related. An enterprise which could not have been successfully prosecuted as a single conspiracy may be tried under RICO. *United States v. Weisman,* 624 F.2d 1118, 1122 (2d Cir.), *cert. denied,* 449 U.S. 871 (1980); *Elliot,* 571 F.2d at 902.

RICO's broad reach increases the chances of spillover when non-RICO offenses are included at trial. When the RICO count includes defendants against whom predicate acts of substantially different characters are asserted, the prospects for prejudice will be greater. The prejudice will result from the dissimilarity in evidence which will be admitted at trial. Furthermore, when the evidence on the substantive counts is entirely circumstantial and barely sufficient while the evidence on the co-defendants' RICO counts consists of voluminous direct testimony, the likelihood of prejudice is magnified to an even greater degree. When the RICO count is not substantiated as to a particular defendant, the linchpin which permitted the joinder of his trial for a non-RICO offense with the RICO trial of the others disappears. However, the prejudicial spillover remains. RICO creates a danger of guilt by association. *United States v. Bledsoe,* 674 F.2d 647, 664 (8th Cir.), *cert. denied,* 103 S. Ct. 456 (1982). It is this very situation which confronted the petitioner. The fact that Congress, by enacting RICO,

widened the scope of joint trials, requires that the protections of fundamental rights provided by *Kotteakos* be applied with greater scrutiny to the circumstances of petitioner's trial.

The unique danger of prejudicial spillover created by a RICO joint trial has been recognized. In *United States v. Guiliano,* 644 F.2d 85 (2d Cir. 1981) the court reversed a conviction for a non-RICO offense because of the danger of prejudicial spillover from a RICO count. *Guiliano* held that, due to the existence of only marginally sufficient evidence to permit the jury to infer the necessary elements of the substantive offense, the "very allegation of the RICO charge" presented a "distinct risk" that the jury was prejudicially influenced in its deliberations. A new trial was therefore ordered in the interests of justice pursuant to 28 U.S.C. §2106. *Guiliano,* 644 F.2d 88-89.

Guiliano was followed in *United States v. Sam Goody,* 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed,* 675 F.2d 17 (2d Cir. 1982), when a conviction at a RICO trial for a non-RICO offense was reversed and a new trial ordered by the court. The court considered the circumstantial evidence on the non-RICO count to be slim but sufficient for presentation of the counts to the jury. However, weighing the manifest harm created by the racketeering allegation and the cumulative effect of the unsustained RICO charge, the court concluded that a distinct risk of prejudicial influence required that a new trial be held in the interests of justice.* *Sam Goody,* 518 F. Supp. 1223.

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* The court of appeals, in its decision dismissing the appeal by the government, questioned in dictum the trial court's ruling. The court doubted that a substantial possibility of prejudice had

A brief review of the facts of petitioner's trial reveals that his situation fits squarely within the doctrine of prejudicial spillover. As in *Sam Goody* and *Guiliano,* the RICO count was not sustained against him. The evidence presented against petitioner on the non-RICO counts was entirely circumstantial, *Napolitano,* 564 F. Supp. at 953, and slight, yet marginally sufficient for submission to the jury. The interplay between the paucity of the quantity and quality of this evidence and the inherently harmful effect of the racketeering allegation created a distinct risk of prejudicial spillover in the jury's deliberations. *See, Guiliano,* 644 F.2d at 88-89; *cf., United States v. Ivic,* 700 F.2d 51, 65 (2d Cir. 1983) (overwhelming evidence of guilt presented). The prejudice to petitioner was increased by the fact that the trial was permeated with allegations relating to organized crime. *cf. Sam Goody,* 518 F. Supp. 1223 (finding of prejudice made by the court despite the prosecutor's admonishment to the jury that the RICO count did not involve an accusation of involvement in organized crime). In addition, evidence of murders, robberies, and gambling operations as well as direct proof of narcotics transactions, all of which were unrelated to petitioner, created an atmosphere of guilt by association

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been created at the trial. The basis for the court's skepticism was the fact that the jury acquitted one of the defendants of a RICO charge while convicting him on the non-RICO offenses. However, selective acquittal by a jury is not determinative on the issue of the lack of substantial prejudice due to spillover. *Kotteakos,* 320 U.S. at 767. Moreover, in *Sam Goody,* unlike the petitioner's situation, the evidence on the non-RICO counts was identical to that for the RICO allegation. Furthermore, in *Sam Goody,* unlike the petitioner's situation, the prosecutor clearly stated that despite the RICO charge the trial did not involve organized crime. *Sam Goody,* 675 F.2d at 29 (Mansfield, J., concurring). Therefore, petitioner's trial represented an even greater danger of prejudicial spillover than that which appeared in *Sam Goody.*

which could very well have prejudicially influenced the jury to be predisposed to return a guilty verdict against him. *See, Bertolotti,* 529 F.2d at 157-158.

The failure of the court below to be "particularly sensitive to the possibility of . . . prejudice," *Schaffer v. United States,* 362 U.S. 511, 516 (1960), in applying the doctrine of prejudicial spillover announced by this Court in *Kotteakos,* 328 U.S. 750, to the context of petitioner's conviction for a non-RICO offense at a multi-defendant RICO trial, warrants a reversal of his conviction and the granting of a new trial pursuant to 28 U.S.C. §2106.

It is respectfully submitted that the application and construction of the Racketeer Influenced and Corrupt Organization Act, a broad and complex federal statute, in relation to the doctrine of prejudicial spillover announced by this Court in *Kotteakos v. United States,* 328 U.S. 740 (1946) are matters of fundamental importance to the fair and proper administration of criminal justice in the United States Courts.

CONCLUSION

It is respectfully submitted that Anthony Rabito's Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
June 7, 1984

Respectfully submitted,

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ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED APRIL 12, 1984, DENYING THE PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of April, one thousand nine hundred and eighty-four.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN RUGGIERO, NICHOLAS SANTORA, VINCENT PITEO, ANTHONY RABITO, ANTONIO TOMASULO,
Defendants-Appellants.

82-1395, 82-1396, 82-1398, 82-1399

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, United States of America and by counsel for the defendant-appellant, Anthony Rabito, a/k/a "Mr. Fish,"

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing of United States of America and Anthony Rabito, a/k/a "Mr. Fish, are DENIED."

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon, rehearing in banc is denied.

s/Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 18, 1984

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 1158, 1362, 1168 and 1363—August Term, 1982
(Argued April 26, 1983 Decided January 18, 1984)
Docket Nos. 82-1395, 82-1346, 82-1398 and 82-1399

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN RUGGIERO, NICHOLAS SANTORA, ANTHONY RABITO, and ANTONIO TOMASULO,

Defendants-Appellants.

Before:

NEWMAN and PRATT, *Circuit Judges,*
METZNER, *District Judge.**

Appeals from judgments of the United States District Court for the Southern District of New York, Sweet, J., convicting four defendants in various combinations of a RICO conspiracy, 18 U.S.C. § 1962(d), a RICO substantive offense, 18 U.S.C. § 1962(c), a substantive drug offense, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and a drug conspiracy, 21 U.S.C. § 846.

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* District Judge of the Southern District of New York, sitting by designation.

Affirmed in part and reversed in part. Judge Newman concurs in part and dissents in part with separate opinion.

BARBARA JONES, New York, New York, assistant United States Attorney for the Southern District of New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Gerard E. Lynch, of Counsel), *for Plaintiff-Appellee.*

ROBERT KOPPELMAN, New York, New York, *for Defendant-Appellant Ruggiero.*

FRANK A. LOPEZ, New York, New York (Meyer & Light, New York, New York, of Counsel), *for Defendant-Appellant Santora.*

PAUL RAO, JR., New York, New York, *for Defendant-Appellant Rabito.*

IRWIN KLEIN, New York, New York, *for Defendant-Appellant Tomasulo.*

PRATT, Circuit Judge:

Appellants Benjamin Ruggiero, Nicholas Santora, Antonio Tomasulo, and Anthony Rabito appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, after a six-week jury trial before Hon. Robert W. Sweet. Their indictment and convictions resulted from a six-year investigation into the Bonanno organized crime family that had uncovered evidence of a wide range of criminal activities, including murder, gambling, narcotics distribution, and armed robbery.

The indictment charged ten defendants in various combinations under four counts. Count One charged a RICO conspiracy under 18 U.S.C. § 1962(d) (1982), part of the Racketeer Influenced and Corrupt Organizations Act. It alleged that all ten defendants had conspired to participate in the affairs of an enterprise, the Bonanno organized crime family, through a pattern of racketeering activity in violation of § 1962(c). The alleged pattern of racketeering activity consisted of 13 separate conspiracies to violate various state and federal laws involving the defendants in various combinations. They were charged with conspiring to murder, to receive stolen goods, to steal goods in interstate commerce, to rob various people, to distribute methaqualone, and to run an illegal gambling business. Count Two charged the appellants, together with John Cerasani and Vincent Piteo, with a substantive RICO violation under § 1962(c). The alleged pattern of racketeering consisted of the substantive crimes which were the subjects of nine of the predicate conspiracies charged under Count One. Counts Three and Four charged appellants Rabito and Santora, together with James Episcopia, with substantive and conspiracy offenses of possessing and distributing methaqualone under 21 U.S.C. §§ 841 and 846 (1982).

Five of the defendants named in the indictment were not tried. Piteo pled guilty to reduced charges before trial, and his conviction is being affirmed by a simultaneously filed opinion. Episcopia's trial was severed. The government entered an order of *nolle prosequi* against Dennis Mulligan. Joseph Messina and Dominick "Sonny Black" Napolitano did not appear for trial, and the New York City Police Department subsequently confirmed that Napolitano had been murdered.

At trial Cerasani was acquitted on all counts. Appellant Ruggiero was convicted of the RICO conspiracy and acquitted of the RICO substantive charge. Appellant Santora was convicted of both RICO charges and the narcotics conspiracy, but acquitted on the narcotics substantive count. Appellant Rabito was acquitted on the RICO conspiracy, but convicted on both narcotics counts. Appellant Tomasulo was convicted of the RICO conspiracy. Thus, on the RICO conspiracy count the jury convicted Ruggiero, Santora and Tomasulo; on the RICO substantive count it convicted only Santora; on the narcotics conspiracy count it convicted Santora and Rabito; and on the narcotics substantive count it convicted only Rabito.

This appeal focuses primarily on two issues involving predicate acts for the RICO conspiracy count. The first issue is whether in a RICO conspiracy prosecuted under 18 U.S.C. § 1962(d) it is permissible for the government to use a conspiracy to commit murder as one of the predicate acts of racketeering activity. We hold that it is. The other issue is whether it is permissible similarly to use a conspiracy to conduct an illegal gambling operation in violation of 18 U.S.C. § 1955. We hold that it is not. There is no merit to any of the other individual or collective claims of error.

I. FACTS

A. The Undercover Operations

Beginning in 1976, special agent Josep Pistone of the FBI began an undercover assignment to infiltrate "fences"—persons who receive stolen goods—associated with organized crime in New York

City. Using the name "Donnie Brasco," Pistone assumed the identity of a burglar and jewel thief. In this undercover role Pistone met appellant Ruggiero, who was affiliated with the Bonnano crime family. Pistone placed bets with and helped Ruggiero make collections for a bookmaking operation run by Ruggiero out of his social club in lower Manhattan. In 1977 Ruggiero confided to Pistone that he had become a "made" member of the Bonnano organized crime family of La Cosa Nostra. He later introduced agent Pistone to various members of the Bonanno family, who were engaged in a variety of criminal activities, primarily in New York City and Tampa, Florida.

Pistone learned that the boss of the family was Carmine Galante, later succeeded by Philip "Rusty" Rastelli, and that the family was organized into five divisions or "crews," each of which was headed by a captain. Ruggiero was a member of Mike Sabella's crew, later captained by codefendant Napolitano. Although transferred by the FBI out of New York in January of 1978, Pistone still kept in frequent contact with Ruggiero.

Meanwhile, FBI agent Edgar Robb assumed an undercover identity in an unrelated investigation in Florida. Using the name "Tony Rossi," Robb, along with other agents, opened the "King's Court Bottle Club" in Holiday, Florida to obtain evidence of criminal activity there.

In March 1980, at agent Pistone's suggestion, Ruggiero met agent Robb at the King's Court, ostensibly to enable Robb to seek Ruggiero's assistance in expanding his operations, and to reduce pressure from other organized crime members. Ruggiero agreed to

help and to provide agent Robb "peace of mind"—in exchange for $3,000 plus $250 a week.

In April 1980, Ruggiero returned to the King's Court with Napolitano, who had replaced Sabella as Ruggiero's captain. Napolitano ordered agents Pistone and Robb to become involved in loan sharking and bookmaking on his behalf.

Napolitano operated his crew from a social club on Graham Avenue in Brooklyn, called the Motion Lounge, where Pistone on several visits met various members of Napolitano's crew, including codefendants Santora, Cerasani, and Tomasulo. Tomasulo ran a bookmaking operation from the Capri Car Service, located diagonally across the street from the Motion Lounge.

B. Electronic Surveillance and Other Investigatory Techniques

The government made extensive use of electronic surveillance during the course of its investigations. Agent Pistone was "wired" with a transmitter during many of the encounters he had with the defendants. The government also placed a series of authorized wiretaps on the telephones of appellants Rabito, Napolitano, Tomasulo, and Ruggiero. In addition, FBI surveillance followed Rabito and photographed him on occasion.

C. The Conspiracy to Murder

Through Ruggiero, agent Pistone learned that in 1981 the five Bonanno captains, Napolitano, Joseph Messina, Philip Giaccone, Alphonse Indelicato, and

Dominick Trinchera, were embroiled in a dispute over control of the family. Napolitano and Messina remained loyal to Rastelli, who was in prison; aligned against them were Giaccone, Indelicato, and Trinchera, who sought to wrest control of the family from Rastelli.

On May 5, 1981, the three rebel captains were lured to a meeting and murdered. Indelicato's body was discovered in a vacant lot in Queens, but the bodies of Giaccone and Trinchera were never found. The evidence did not conclusively establish who actually was responsible for the murders, but Napolitano, Ruggiero, Rabito, and Messina were all strongly implicated.

For instance, agent Pistone had tried to reach Ruggiero by telephone on May 5, 1981, the day of the murders, but was unable to do so. Three days later FBI surveillance identified Ruggiero leaving Rabito's apartment with two other men, all carrying suitcases, and they all drove away in a car registered to Santora. That same day, May 8, 1981, agent Pistone spoke to Ruggiero in a taped conversation. Ruggiero explained that he had "come in" because his wife had not packed him enough clothes, and then told Pistone that he would be gone "awhile yet" but proclaimed that "everything is fine, we're winners," and that a "lot of punks ran away—but—they came back—we gave them sanctuary." He added, there was "one more situation" they had to take care of. On another occasion Ruggiero stated that he, Santora and two others were at the "hit." He also complained that Messina was supposed to take care of Indelicato's body but had "screwed it up." In addition, both Ruggiero and Santora described details of the shooting of Trinchera.

On May 12, 1981, Ruggiero told agent Pistone that Napolitano wanted to see him in New York. At the meeting Napolitano told Pistone, "we took care of those three guys, they're gone," but that Indelicato's son, Anthony "Bruno" Indelicato, got away. Napolitano then told agent Pistone that Bruno might have gone to Florida, and he ordered Pistone to hit Bruno if he found him.

D. The Narcotics Distribution

1. In the Southern District

Conversations intercepted from wiretaps on defendant Rabito's phone indicated that Rabito was involved in the distribution of quaaludes in the Southern District of New York. The conversations indicated that, from May 28, 1981 through July 9, 1981, Rabito had negotiated for the purchase of quaaludes from a source named George Gulla, and then arranged for the sale of those pills to his own regular customers. FBI surveillance of Rabito, supplemented with photographs, corroborated the various meetings arranged over the telephone.

2. In the Eastern District

While in New York on May 15, 1981, agent Pistone arranged with Napolitano and Cerasani to purchase quaaludes for redistribution in Florida. After Pistone had asked Napolitano for samples of quaaludes, Santora and Cerasani gave Pistone samples at Tomasulo's Capri Car Service. A week later Ruggiero discused the quality and price of the pills with agent Pistone and told Pistone to let him know when Pistone was ready for a large sale. The

government later intercepted a conversation between Tomasulo and an individual named "Rocky" in which Rocky asked Tomasulo for 2,000 quaaludes.

E. The Gambling Operations

On visits to New York, agents Robb and Pistone often saw Tomasulo and Santora in the Motion Lounge with other members of Napolitano's crew. On one visit, Pistone brought $2,500—at Napolitano's request—to cover losses from Napolitano's bookmaking operation. Napolitano introduced Tomasulo to agent Pistone as his partner in the numbers operation. Government informant Raymond Wean, who was a member of Messina's crew, testified that he had seen Tomasulo reviewing numbers bets with Santora and Cerasani on several occasions. Expert witnesses concluded, after analyzing over 150 intercepted conversations, that Santora and Tomasulo were involved in a numbers operation.

F. Additional Crimes

The government also introduced evidence to show that members of various Bonnano family crews were engaged in other criminal activities, such as an attempted robbery of an apartment belonging to the Shah of Iran's family, and a truck theft.

II. DISCUSSION

A. Conspiracy as a Predicate Act—In General

Appellants Ruggiero, Santora, and Tomasulo raise several issues directed at Count One of the indictment, the RICO conspiracy. One of those issues,

whether a conspiracy may serve as a predicate act for a RICO conspiracy charge under 18 U.S.C. § 1962(d), has not previously been determined in this circuit.

Count One of the indictment charged them and seven other defendants with violating § 1962(d) by conspiring to participate in the affairs of a criminal enterprise, "the Bonanno Family of La Cosa Nostra," through a pattern of racketeering activity that included 13 different crimes, all of them conspiracies. In order to satisfy the statutory definition of a "pattern of racketeering activity," 18 U.S.C. § 1961(5), each defendant was charged with at least two predicate acts.

For example, Ruggiero was charged with four conspiracies to murder in violation of N.Y. Penal Law §§ 125.25 and 105.15 (McKinney 1975), and one conspiracy to distribute quaaludes in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 846 Santora was charged with the same predicate acts plus a conspiracy to distribute quaaludes in violation of the same federal statutes and a conspiracy to direct and own an illegal gambling business in violation of 18 U.S.C. § 1955. Tomasulo was charged with only two predicate conspiracies: one to distribute quaaludes, and the other to conduct an illegal gambling operation.

These appellants contend that a conspiracy may never serve as a predicate act of racketeering activity for a RICO conspiracy charge under 18 U.S.C. § 1962(d), but none of their supporting arguments has merit. "Racketeering activity" was expressly defined by Congress as including four groups of crimes. Group (A) includes "any act or threat involving murder" and

a variety of other crimes, provided it is "chargeable under State law and punishable by imprisonment for more than one year." Group (B) includes "any act which is indictable under any of 33 enumerated sections of Title 18 of the United States Code. Group (C) includes "any act which is indictable under § 186 or § 501(c) of Title 29 of the United States Code. Group (D) includes "any offense involving" bankruptcy fraud, securities fraud, or drugs that is "punishable under any law of the United States." 18 U.S.C. § 1961(1).

In *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S. Ct. 209, 66 L.Ed.2d 91 (1980), we held "that conspiracy can properly be charged as a predicate act of racketeering under RICO, at least when it involves any of the substantive offenses listed in [group (D)]." 624 F.2d at 1123. In reaching that conclusion we viewed the phrase "any offense involving," found in § 1961(1)(D), as "certainly broad enough on its face to include *conspiracies* involving securities and bankruptcy fraud and drug related offenses." *Id.* at 1124 (emphasis added). We noted that, although Congress had deleted the term "conspiracy" from earlier drafts of the RICO statute, in the final version it nevertheless retained in subsection (D) the expansive language "any offense involving," while it conspicuously omitted that language from subsections (B) and (C), which require that the racketeering act "be indictable under specifically enumerated sections of the [federal] criminal code." *Id.*

[1] Our holding in *Weisman* directly controls the conspiracy to distribute quaaludes charged as a predicate act against Ruggiero, Santora, and Tomasulo. Moreover, the sound reasoning behind

Chief Judge Feinberg's opinion in *Weisman* confirms Congress's intention that a conspiracy to violate state law can be a predicate act under subsection (A). Just as subsection (D)'s phrase "any offense involving" was broad enough in *Weisman* to include a conspiracy to commit bankruptcy fraud, securities fraud, or narcotics violations, so is subsection (A)'s phrase, "*any act* or threat *involving* murder, ***, gambling, *** which is *chargeable* under State law *and punishable* by imprisonment for more than one year" (emphasis supplied), broad enough to include a conspiracy to commit any one of those state law crimes. *See United States v. Welch*, 656 F.2d 1039, 1063 n. 32 (5th Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S. Ct. 1768, 72 L.Ed. 2d 173 (1981).

B. Conspiracies to Murder

Turning our attention specifically to the conspiracies to murder charged as predicate acts committed by Ruggiero and Santora, we focus more sharply on the language of the statute. See *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). Appellants were convicted of violating § 1962(d), which provides:

> It shall be unlawful for any person to conspire to violate [subsection (c)] of this section.

Subsection (c), in turn, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ***.

"Pattern of racketeering activity" is defined under 18 U.S.C. §1961(5). It requires among other things "at least two acts of racketeering activity." Section 1961(1) defines "racketeering activity" to mean "any act or threat involving murder, ***, which is chargeable under State law and punishable by imprisonment for more than one year."

[2] In the context of the subject indictment, therefore, the issue with respect to Ruggiero and Santora is whether a conspiracy to commit murder is an "act or threat involving murder *** which is chargeable under State law." Guided by Congress's expressed intention that the RICO statute "shall be liberally construed to effectuate its remedial purposes," Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961 (note)), we conclude that a conspiracy to murder in violation of New York's Penal Law §§ 125.25 and 105.15 is an "act involving" murder and therefore may constitute "racketeering activity" within the meaning of the RICO statute.

The indictment alleges that all four of the murder conspiracies were committed in violation of particular sections of New York's Penal Law. Section 125.25 proscribes murder in the second degree and classifies it as a Class A-1 felony which is punishable by life imprisonment under N.Y. Penal Law § 70.00(2)(a) (McKinney 1975). Section 105.15 proscribes conspiracy to engage in conduct constituting a Class A felony, and classifies the conspiracy as a Class B felony which is punishable by imprisonment up to 25 years under N.Y. Penal Law § 70.00(2)(b). Thus, as acts "involving" murder, which are felonies under New York state law, the four conspiracies to commit murder charged as predicate acts in the indictment

constitute acts of "racketeering activity" within the meaning of the RICO statute.

C. Gambling Conspiracy

[3] In contrast, the gambling conspiracy charged as a predicate act in paragraph 5m of Count One cannot serve as an act of "racketeering activity" under the definitions set forth in 18 U.S.C. § 1961(1). The indictment charged that Santora, Tomasulo, and others conspired "to direct and own an illegal gambling business, to wit, a sports and numbers betting business, in violation of the laws of the State of New York, which business involved five or more persons and remained in substantially continuous operation for in excess of thirty (30) days in violation of Title 18 U.S.C. § 1955."

Section 1955, allegedly violated by the gambling conspiracy, is one of the sections included in Group (B) of the statutory definitions contained in § 1961(2). However, to constitute a predicate act under Group (B), the offensive conduct must be an "act which is indictable under" the named section, here § 1955, which proscribes the substantive offense of conducting an illegal gambling business, but not a conspiracy to conduct one. Thus, a conspiracy to violate § 1955 is not an act of racketeering activity under the definitions in 18 U.S.C. § 1961.

As an alternative argument to save predicate act 5m of Count One, the government suggests that its allegation of a conspiracy to violate § 1955 is surplusage that can be disregarded because if the indictment had alleged instead a substantive violation of § 1955 the charge then would have been sufficient.

We do not think that the difference between a substantive gambling crime under § 1955 and a conspiracy to violate § 1955, which under federal law could be charged only under 18 U.S.C. § 371 (1981), can be so readily put aside.

First, the entire structure of paragraph 5 of Count One, setting forth in each subparagraph a different conspiracy, alerts defendants that the predicate acts they must defend against are conspiracies, not substantive crimes. Second, the contrast of Count Two, which sets forth only substantive crimes, reinforces the impression created by the allegations of Count One. Third, the fact that some defendants were charged in Count One and not in Count Two throws into bold relief the contrast between the conspiracy predicate acts alleged in Count One, and the substantive predicate acts alleged in Count Two. Finally, the proof of a conspiracy to violate the gambling law as a predicate act under Count One is not identical with the proof required to establish a substantive violation of § 1955 as a predicate act. We cannot, therefore, simply disregard as mere surplusage the conspiracy allegation of predicate act 5m. Since the government alleged a conspiracy to violate § 1955, and since the trial court charged such a conspiracy to the jury, we must review the case as including such a conspiracy.

Finally on this point, the government argues that the conspiracy alleged in paragraph 5m falls under Group A as a conspiracy to violate state law rather than under Group B as an offense indictable under 18 U.S.C. § 1955. This argument, too, must fail. In the first place, it contradicts the language of the indictment. Second, in submitting this act of racketeering to the jury, the court charged in detail the essential

elements of a gambling offense under 18 U.S.C. § 1955. Although the court did refer to the general definitions of "bookmaking," "policy," and "the numbers game" as set forth in New York's Penal Law § 225.00, its instruction was not sufficient to submit the gambling conspiracy as a state offense under Group (A), because the court did not charge the essential elements of a felony under New York's gambling statutes. Article 225 of New York's Penal Law creates five gambling offenses, only two of which, §§ 225.10 and 225.20, are felonies. The other three, §§ 225.05, 225.15, and 225.30, are misdemeanors. To qualify as a predicate act under Group A the offending conduct must be not only "chargeable under State law" but also "punishable by imprisonment for more than one year." By way of comparison to violate the federal gambling statute, the government need prove only that the gambling business conducted "is a *violation* of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955(b))1)(i) (emphasis added). Thus, any gambling violation under state law, whatever its classification, may support a federal prosecution under § 1955; but to constitute a Group A predicate act, a state gambling charge would have to include those elements which make the chargeable offense punishable by more than one year in prison.

Since neither the indictment nor the court's charge to the jury set forth those additional factors for the jury's consideration, predicate act 5m may not be construed as a conspiracy to violate state gambling laws. As submitted to the jury, therefore, the thirteenth predicate act, conspiracy to direct and own an illegal gambling business, does not qualify as an act of racketeering activity under RICO.

D. Disposition of Count One (RICO Conspiracy)

We concluded earlier that just as a conspiracy to commit bankruptcy fraud, securities fraud, or a drug offense qualifies as a RICO predicate act under Group D, 18 U.S.C. § 1961(1)(D), so does a conspiracy to commit murder qualify as a RICO predicate act under Group A, § 1961(1)(A). This conclusion requires affirmance of the conviction of Ruggiero under Count One, because his predicate acts were conspiracies to murder, together with one drug conspiracy that is not in issue here. On the other hand, we have also concluded that a conspiracy to promote gambling in violation of 18 U.S.C. § 1955 does not qualify as a RICO predicate act, so we must examine the impact of that conclusion on the convictions of Tomasulo and Santora.

1. Tomasulo

[4] Tomasulo was charged with only two predicate acts, one of which was the legally insufficient gambling conspiracy. Without the gambling predicate act, the charge against Tomasulo must be dismissed because it does not satisfy the statute's requirement that a "pattern of racketeering" consist of at least two acts of racketeering. 18 U.S.C. § 1961(5).

The government argues that no predicate acts are necessary for a RICO conspiracy charge against Tomasulo, and that it is sufficient that Tomasulo was found to have conspired with others to engage through an enterprise in a pattern of racketeering consisting of predicate acts committed by others. We are reluctant to accept this extremely broad interpretation of RICO in the absence of controlling authority.

Prevailing case law requires that for the government to convict on a RICO conspiracy it must prove that defendant himself at least agreed to commit two or more predicate crimes. *United States v. Bagaric*, 706 F.2d 42, 62 (2d Cir. 1983); *United States v. Brooklier*, 685 F.2d 1208, 1223 (9th Cir. 1982), *cert. denied*, __U.S.__, 103 S. Ct. 1194, 75 L.Ed.2d 439 (1983); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, __U.S.__, 103 S. Ct. 1250, 75 L.Ed.2d 479 (1983); *United States v. Sutherland*, 656 F.2d 1181, 1186-87 (5th Cir. 1981), *cert. denied*, 455 U.S. 949, 102 S. Ct. 1451, 71 L.Ed.2d 663 (1982); *United States v. Barton*, 647 F.2d 224, 237 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 (L.Ed. 2d 152 (1981); *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). The trial court so instructed the jury in this case, and we see no reason now to apply a different view. As to Tomasulo, therefore, we reverse and dismiss.

2. Santora

[5] Santora's situation is different. He was charged in Count One with involvement in eight conspiracies as acts of racketeering activity: four to murder, two to distribute drugs, one to rob, and one to conduct a gambling business. Because the jury was asked to determine only the guilt or innocence of Santora on the RICO conspiracy count, we cannot tell from its verdict on Count One what decisions it made with respect to the eight predicate acts. Its verdict of guilty establishes that Santora had committed at least two of the charged predicate conspiracies. For all we know, the jury may have found he committed more than two, possibly even all eight. However, absent

some indication by the jury that its determination of guilt rested on two or more predicate acts that are legally sufficient, we are required to reverse the conviction because the legally insufficient predicate act relating to gambling may have been necessary to the verdict.

To avoid reversal of Santora's RICO conspiracy conviction the government advances three arguments, none of which is persuasive. First, the government contends that because Santora was convicted under Count Two, which set forth six substantive crimes, all of which are legally sufficient predicate acts of racketeering, we can be satisfied within the principles underlying *United States v. Weisman*, 624 F.2d at 1124, and *United States v. Parness*, 503 F.2d 430, 438 (2d Cir.), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975), that Santora did engage in a pattern of racketeering by committing at least two predicate acts. In both *Weisman* and *Parness* this court found that the defendant's convictions on separate substantive counts alleged in the same indictment were sufficient to establish the requisite pattern of racketeering activity for the RICO conviction. In each of those cases, however, the substantive crimes relied on were also alleged in the RICO count as predicate acts of racketeering, so that the court was assured by the separate convictions that the jury had found defendant guilty of committing at least two of the predicate acts alleged in the indictment. We have no such assurance with Santora's conviction, however, because the predicate acts alleged in Count One were all conspiracies, and the predicate acts in Count Two, on which the government would have us rely, were all substantive crimes. In effect, what the government is asking us to do is to amend Count One

of the indictment on appeal by changing the predicate acts in that count from the conspiracies alleged and submitted to the jury to the substantive crimes included as predicate acts in Count Two. This we decline to do.

Second, the government contends that because the substantive crimes alleged as predicate acts in Count Two parallel six of the conspiracies alleged in Count One, we can be satisfied that the conspiracy to violate § 1955 alleged in predicate act 5m of Count One was not a necessary part of the jury's verdict. The argument fails, however, because one of the substantive crimes alleged as a predicate act in Count Two was to conduct a gambling business in violation of 18 U.S.C. § 1955. Since we cannot determine otherwise from the jury's verdicts, in fairness to the defendant we assume that the gambling predicate act was necessary to each verdict. While the substantive crime of gambling as a predicate act is sufficient under Count Two, thereby requiring affirmance of Santora's conviction on that count, the conspiracy to gamble under Count One is not sufficient, as we have already indicated.

Third, the government contends that Santora may not avail himself of the legal insufficiency of the gambling conspiracy as a predicate act because he did not move in the trial court to withdraw the defective predicate act from jury consideration. In support, the government relies upon *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934, 96 S. Ct. 1663, 48 L.Ed.2d 175 (1976); *United States v. Bonacorsa*, 528 F.2d 1218 (2d Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2647, 49 L.Ed.2d 386 (1976); *United States v. Goldstein*, 168 F.2d 666 (2d Cir. 1948);

United States v. Mascuch, 111 F.2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650, 61 S.Ct. 14, 85 LEd. 416 (1940). All of those cases, however, dealt with the sufficiency of the evidence to support one of several specifications in a perjury count. We do not consider them controlling in this situation where we are dealing not with the sufficiency of evidence, but with the legal sufficiency of the charge itself. Similarly, the two additional cases cited by the government, *United States v. Mowad*, 641 F.2d 1067 (2d Cir.), *cert. denied*, 454 U.S. 817, 102 S.Ct. 94, 70 L.Ed. 2d 86 (1981), and *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), involving conspiracies alleging several objectives, only one of which was fraud, dealt only with the sufficiency of the evidence. Despite *Dixon's* reference in a dictum to contrary views in two other circuits, 536 F.2d at 1402, neither *Dixon* nor *Mowad* permits a defendant to be convicted of a conspiracy when some of the objectives charged were not crimes.

In short, Santora's conviction on Count One must be reversed. However, unlike Tomasulo, against whom only two predicate acts were alleged, Santora was charged with several other legally sufficient predicate acts. As to him, therefore, a new trial on Count One is ordered, should the government elect to pursue it.

We take this opportunity to alert bench and bar that in a complex RICO trial such as this one, it can be extremely useful for a trial judge to request the jury to record their specific dispositions of the separate predicate acts charged, in addition to their verdict of guilt or innocence on the RICO charge. *See, e.g., United States v. Walsh*, 700 F.2d 846, 851-52 (2d Cir.), *cert. denied*, __U.S.__, 104 S.Ct. 96, 78 L.Ed.2d 102

(1983); *United States v. Angelilli*, 660 F.2d 23, 30 (2d Cir. 1981), *cert. denied*, 455 U.S. 945, 102 S.Ct. 1442, 71 L.Ed.2d 657 (1982). Then if, as here, a defect affecting a single predicate act is later discovered, an automatic retrial can be avoided whenever the jury's additional determinations indicate that the defendant has been found beyond a reasonable doubt to have committed at least two other of the alleged predicate crimes. While a defendant is not prejudiced by the failure of the trial judge to request separate decisions on the predicate acts, obtaining such decisions in every complex RICO case would greatly facilitate sound management of judicial resources.

D. Other Issues

Appellants' other contentions are quickly disposed of.

[6, 7] 1. Contrary to appellants' arguments, RICO does apply to illegal, illegitimate enterprises such as the Bonanno crime family, *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), and the RICO statute is not unconstitutionally vague, *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3109, 69 L.Ed.2d 971 (1981). As we noted in *United States v. Weisman*, "the present indictment is not rendered invalid simply because some hypothetical prosecutions under the statute as presently interpreted would fall beyond the pale of intended application." 624 F.2d at 1124. Santora does not claim that the statute is vague as applied to him. Indeed, we have no doubt that the conduct for which he was indicted, murder, distributing narcotics, and gambling, all in furtherance of the Bonanno family enterprise, is precisely the type of ac-

tivity Congress sought to reach through RICO. *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980).

[8. 9] 2. Nor does a RICO conspiracy under 18 U.S.C. § 1962(d), supported by predicate acts of racketeering activity that in themselves are conspiracies, violate the principle of *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), which prohibits conviction of multiple conspiracies under an indictment charging a single conspiracy. *United States v. Elliott*, 571 F.2d at 900-902. A RICO conspiracy under § 1962(d) based on separate conspiracieis as predicate offenses is not merely a "conspiracy to conspire" as alleged by appellants, but is an overall conspiracy to violate a substantive provision of RICO, in this case § 1962(c), which makes it unlawful for any person associated with an interstate enterprise to "participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." See *United States v. Zemek*, 634 F.2d 1159, 1170 n. 15 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981). The trial judge clearly instructed the jurors that to find a particular defendant guilty of the RICO conspiracy they would have to find beyond a reasonable doubt that he wilfully participated in at least two of the conspiracies alleged as predicate offenses, that the predicate offenses constituted a pattern of racketeering activity, and that, in addition, the defendant under consideration conspired to participate in the affairs of the Bonanno crime family by engaging in the predicate offenses. The instruction was proper, and the evidence was sufficient to support the defendants' convictions.

3. Santora claims error in the admission against him of coconspirators' statements made to agent Pistone concerning Santora's involvement in the various racketeering acts. Following the requirements of *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970), the trial judge found, with substantial evidentiary support, that there was sufficient nonhearsay evidence to establish Santora's membership in the conspiracy and, therefore, to warrant admission under Fed. R. Evid. 801(d)(2)(E) of coconspirators' statements made in furtherance of the conspiracy.

[10] 4. More specifically, Santora challenges the admission of Ruggiero's statement to agent Pistone that Santora was present when the three rival captains in the Bonanno family were murdered. Santora argues that this statement was merely a narrative of past activities and therefore was not in furtherance of the conspiracy. We disagree. Other evidence established that Ruggiero considered agent Pistone to be a fellow member of Napolitano's crew in the Bonanno family and that Pistone and Ruggiero were in contact several times each week regarding the affairs of the enterprise. Napolitano had instructed Pistone to "hit" Bruno Indelicato, who had somehow escaped the initial ambush. Under these circumstances we are satisfied that Ruggiero's statement to agent Pistone as to the circumstances surrounding the three murders was made in furtherance of the conspiracy.

(11) 5. Ruggiero's attack on the affidavits submitted in support of the applications for the wiretap orders borders on the frivolous. 18 U.S.C. § 2518(1)(c) (1982) requires "a full and complete statement as to

whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Viewing the affidavits submitted in support of the wiretap applications in a " 'common sense and realistic fashion,' " *United States v. Ivic*, 700 F.2d 51, 57 (2d Cir. 1983); *see United States v. Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976), and with the deference properly accorded to the issuing judge, *United States v. Perry*, 643 F.2d 38, 50 (2d Cir.), *cert. denied*, 454 U.S. 835, 102 S.Ct 138, 70 L.Ed.2d 115 (1981); *see United States v. Todisco*, 667 F.2d 255, 258 (2d Cir. 1981), *cert. denied*, 455 U.S. 906, 102 S.Ct. 1241, 71 L.Ed.2d 444 (1982), we find that the affidavits amply satisfy the requirements of the statute.

Unlike the bare conclusions averred in *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1975) and *United States v. Lilla*, 699 F.2d 99 (2d Cir. 1983), the cases relied on by Ruggiero, affidavits in the case at bar give specific, detailed reasons why the wiretaps were needed. For instance, the affidavits provide exhaustive detail of the evidence available by "traditional" investigative means, and state the reasons why those techniques were unsatisfactory in this case. Agent Pistone, who operated undercover primarily in Florida, had limited access to the principal subjects of the investigation in New York, and was not privy to information about many of the activities of the enterprise. The affidavits also point out the "inherently secretive structure of the criminal enterprise under investigation," and that the Motion Lounge and the Capri Car Service were in a homogenous neighborhood in Brooklyn where normal surveillance was risky. They further establish that the use of search war-

rants, investigative grand juries, or interviews would publicize the investigation, compromise the safety of the undercover agents, and perhaps jeopardize the investigation itself. In sum, there is no merit in Ruggiero's challenge to the wiretap orders.

[12] 6. Ruggiero was not denied a fair trial by the limitations the trial judge placed on his attempt to show that the FBI had brought false charges against him because he had refused to cooperate with the prosecution. Judge Sweet did permit cross-examination on agent Pistone, the principle witness against Ruggiero, along the lines suggested, but Ruggiero's counsel voluntarily restricted that cross-examination after Judge Sweet alerted him to the possibility that his questioning might open the door to presenting agent Pistone's prior consistent statements.

[13] 7. We find no error in Judge Sweet's refusal to permit testimony by the other agents on the same issue. Not only was Ruggiero's offer of proof ephemeral, but the inquiry proposed would have focused on irrelevant issues, would have opened the door to collateral evidence, and would have further delayed a lengthy trial. In these circumstances the trial court had discretion to exclude the proffered testimony. *See United States v. Corr,* 543 F.2d 1042, 1051 (2d Cir. 1976); *see also United States v Bifield,* 702 F.2d 342, 350 (2d Cir. 1983); *United States v. Pacelli,* 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied,* 424 U.S. 911, 96 S.Ct. 1106, 47 L.Ed.2d 314 (1976); *United States v. Clark,* 613 F.2d 391, 407 (2d Cir. 1979), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

[14] 8. Ruggiero's claim that he was denied his speedy trial rights under the statute, 18 U.S.C. §§ 316(b) and 3162(a)(1) (1982), is also without merit. The continuances granted by the district court under 18 U.S.C. § 3161(h)(8)(A) were proper in light of the large volume of evidence, the complexity of the case, and the continuing investigation. *United States v. McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), *cert. denied*, 446 U.S. 967, 100 S.Ct. 2946, 64 L.Ed.2d 827 (1980); *United States v. Rollins*, 487 F.2d 409, 413-14 (2d Cir. 1973); *United States v. Cuomo*, 479 F.2d 688, 693-94 (2d Cir. 1973).

[15] 9. Ruggiero's claim of unconstitutional preindictment delay falls because he failed to show either actual prejudice or unjustifiable governmental conduct, such as deliberate delay to achieve a substantial tactical advantage. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *United States v. Lovasco*, 431 U.S. 783, 789 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977); *United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir.), *cert. denied*, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979); *United States v. Rubin*, 609 F.2d 51, 66 (2d Cir. 1979), *aff'd*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981).

10. Rabito's only separate claim on appeal is that he is entitled to a new trial in the interest of justice because the jury's deliberations were tainted by evidence offered against him on the RICO conspiracy count, on which he was acquitted, and by evidence presented against other defendants on that and other counts of the indictment. Rabito was convicted of drug violations under Counts Three and Four of the indictment. In his post-trial decision denying Rabito's Rule 33 motion, Judge Sweet carefully evaluated this

claim of prejudicial spillover. We agree with his analysis and find no need to repeat it here.

III. CONCLUSION

The judgment against Antonio Tomasulo on Count One is reversed, and the case against him is remanded with a direction to dismiss that count of the indictment. The judgment against Nicholas Santora on Count One is reversed, and the case against him on that count is remanded for a new trial. In all other respects the judgments appealed from are affirmed.

JON O. NEWMAN, Circuit Judge, concurring in part and dissenting in part:

Except for the reversal of Santora's conviction on Count One, see Part II, *infra*, I concur in Judge Pratt's thorough opinion for the Court and write separately primarily to discuss his suggestion that in complex RICO trials it would be useful to put special interrogatories to the jury to ascertain which predicate acts the jurors find to have been proven.

I. Jury Interrogatories in Criminal Cases

Without doubt the use of jury interrogatories is a practical way of avoiding a retrial in the class of RICO cases, of which this is one, where a legally insufficient predicate act has been submitted to a jury but two or more valid acts, adequate to support a guilty verdict, can be established. An interrogatory eliciting "yes" responses as to two or more valid predicate acts would permit affirmance in such a case, so long as the jury, by a general verdict of guilty, found that all of the elements of the offense charged has been proven

beyond a reasonable doubt. What is less certain is whether we may authorize even such a limited use of jury interrogatories in criminal cases.

There is no counterpart in the Federal Rules of Criminal Procedure to the general authority contained in Rule 49(b) of the Federal Rules of Civil Procedure to have a jury respond to interrogatories when returning a general verdict.[1] Arguably, the absence of such general authority for interrogatories in criminal cases together with the specific requirement for special verdicts in Fed. R. Crim. P. 31(e) applicable only to criminal forfeiture cases, *see United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980), and the specific requirement for findings in non-jury criminal cases, Fed. R. Crim. P. 23(c), all suggest that interrogatories are not to be used in criminal cases. However, there is lacking in the history of Fed. R.Crim.P. 31 any indication that interrogatories were intended to be prohibited in jury cases, *cf. United States v. Pachay*, 711 F.2d 488, 490 (2d Cir. 1983) (evidence of intent to prohibit waiver of jury unanimity), and the fact that special jury fact-finding is required in criminal forfeiture cases does not mean that is not permissible in other criminal cases. Moreover, Fed. R.Crim.P. 57(b) provides that in the absence of a procedure specified by rule, the court may proceed "in any lawful manner not inconsistent with these rules or with any applicable statute."

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1. Though the term "special verdict" is sometimes used as the equivalent of a jury interrogatory, "special verdicts," as contemplated by Fed. R. Civ. P. 49(a), are used to elicit precise findings by the jury in the absence of a general verdict, and "interrogatories," contemplated by Fed. R. Civ. P. 49(b), are used in conjunction with a general verdict.

Some case law has disfavored jury interrogatories in criminal cases, *see, e.g., Stein v. New York*, 346 U.S. 156, 178, 73 S.Ct. 1077, 1089, 97 L.Ed. 1522 (1953) (questioning the practice); *United States v. Bosch*, 505 F.2d 78 (5th Cir. 1974) (conviction reversed because interrogatories used); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (same); *Gray v. United States*, 174 F.2d 919 (9th Cir.) (same), *cert. denied*, 338 U.S. 848, 70 S.Ct. 90, 94 L.Ed. 519 (1949), *see also United States v. Jackson*, 542 F.2d 403, 412-13 (7th Cir. 1976) (approving rejection of defendant's request for interrogatory on insanity defense), though support for the practice has been expressed, *Fuller v. United States*, 407 F.2d 1199, 1221, 1231 n. 47 (D.C. Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1120, 89 S.Ct. 999, 22 L.Ed.2d 125 (1969). However, the selective use of interrogatories has been approved in criminal cases, most pertinently in *United States v. Palmeri*, 630 F.2d 192, 202-03 (3d Cir. 1980), *cert. denied*, 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981), where the jury was asked to indicate which of 46 predicate acts were proven in a multi-defendant RICO case, and in other cases when necessary to establish a fact crucial to sentencing or an overt act constitutionally required for the offense of treason. See cases collected in *United States v. Spock, supra*, 416 F.2d at 182 n. 41.

In this Circuit, the practice has evoked differing responses. We expressed general disapproval in *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir.) (per curiam), *cert. denied*, 404 U.S. 393, 92 S.Ct. 278, 30 L.Ed.2d 252 (1971), though we were there rejecting the prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request interrogatories. *See Skidmore v. Baltimore & Ohio Ry.*, 167 F.2d 54, 70 (2d Cir.) (L. Hand, J., concurring) (jury particularization "undesirable" in criminal cases),

cert. denied, 335 U.S. 816, 69 S.Ct. 34, 93 L.Ed. 371 (1948). *See also United States v. Gallishaw*, 428 F.2d 760, 765 (2d Cir. 1970) (noting the issue, but not resolving it). In *United States v. Margiotta*, 646 F.2d 729, 733-34 (2d Cir. 1981), *cert. denied*, __U.S.__, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983), we pointed out the permissible use of an interrogatory if requested by a defendant to identify one or more actionable mailings underlying a single mail fraud count. We have also approved an interrogatory when pertinent to sentencing. *United States v. Stassi*, 544 F.2d 579, 583-84 (2d Cir. 1976), *cert. denied*, 430 U.S. 907, 97 S.Ct. 1176, 51 L.Ed.2d 582 (1977). In two cases, as Judge Pratt points out, we have affirmed RICO convictions and noted without comment the use of interrogatories to identify predicate acts, though the practice was not challenged on appeal. *United States v. Walsh*, 700 F.2d 846, 851 (2d Cir.), *cert. denied*, __U.S.__, 104 S.Ct. 96, 78 L.Ed.2d 102 (1983); *United States v. Angelilli*, 660 F.2d 23, 30 (2d Cir. 1981), *cert. denied*, 455 U.S. 945, 102 S.Ct. 1442, 71 L.Ed.2d 657 (1982). Also instructive is Judge Palmieri's thoughtful opinion in *United States v. Ogull*, 149 F. Supp. 272 (S.D.N.Y. 1957), *aff'd without consideration of this point sub nom. United States v. Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968, 78 S.Ct. 1006, 2 L.Ed.2d 1073 (1958),[2] explaining the need to use an interrogatory to determine whether the defendants' conduct was governed by a recently enacted statute.

Various considerations underlie the opposition to jury interrogatories in criminal cases. There is ap-

2. The use of an interrogatory was agreed to by defense counsel in the trial court. *United States v. Ogull*, *supra*, 149 F.Supp. at 278, and not challenged on appeal.

prehension that eliciting "yes" or "no" answers to questions concerning the elements of an offense may propel a jury toward a logical conclusion of guilt, whereas a more generalized assessment might have yielded an acquittal.[3] *See United States v. Spock, supra,* 416 F.2d at 182. The possibility also exists that fragmenting a single count into the various ways an offense may be committed affords a divided jury an opportunity to resolve its differences to the defendant's disadvantage by saying "yes" to some means and "no" to others, although unified consideration of the count might have produced an acquittal or at least a hung jury. These concerns apparently influenced the courts in *United States v. James,* 432 F.2d 303 (5th Cir. 1970), *cert. denied,* 403 U.S. 906, 91 S.Ct. 2214, 29 L.Ed. 21, 682 (1971) (interrogatory asked jury to identify objects of a conspiracy); *United States v. Spock, supra* (identification of means of committing the offense); *Gray v. United States, supra* (same), although jury identification of objects of a conspiracy has been approved when the defendant conents, *United States v. O'Looney,* 544 F.2d 385, 392 (9th Cir.), *cert. denied,* 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976). Interrogatories are especially objectionable when they make resolution of a single fact issue determinative of guilt or innocence, without regard to the elements of an offense, see *United States v. Bosch,* 505 F.2d 78, 80-81 (5th Cir. 1974) (existence of promise of immunity), or when their wording shifts the burden of proof to

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3. I think it more likely that a jury, generally inclined toward conviction by unflattering evidence about the defendant or by his vague connection with the alleged offense, might be impelled to acquit if obliged to record its determination of the existence of the elements of the offense in cases where the evidence concerning one or more elements is questionable.

the defendant, *United States v. Wilson*, 629 F.2d 439 (6th Cir. 1980) (interrogatory concerning insanity defense). Also of obvious danger though not considered prejudicial in the circumstances presented, is an interrogatory to be answered only in the event of an acquittal. See *Heald v. Mullaney*, 505 F.2d 1241 (1st Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1339, 43 L.Ed.2d 432 (1975). In general, those opposing interrogatories fear that any particularization of the jury's decision-making will risk interference with the jury's romantic power of nullification, or as Learned Hand felicitously phrased it, "tempering [the law's] rigot by the mollifying influence of current ethical conventions." *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir.), *rev'd on other grounds*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942). Though courts refuse to inform a jury of this prerogative, *United States v. Doughterty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972); *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991, 90 S.Ct. 1124, 25 L.Ed.2d 398 (1970), some condemn interrogatories because they may impair an opportunity the jury is not told it has. See *United States v. Spock, supra*, 416 F.2d at 182.

On balance, I am persuaded that a District Court should have the discretion to use a jury interrogatory in cases where risk of prejudice to the defendant is slight and the advantage of securing particularized fact-finding is substantial. Ascertainment of predicate acts in a complex RICO trial is an example where the balance tips decidedly in favor of using an interrogatory. The concerns that have prompted disapproval of interrogatories in other contexts are either totally lacking or at best insignificant in this type of case, and such use might avoid the time and

cost of a long retrial. I therefore agree that we should join with the Third Circuit in approving the use of an interrogatory to identify proven predicate acts in complex RICO trials. *United States v. Palmeri, supra.*

The procedure to be followed when an interrogatory is used in a criminal trial should be within the discretion of the trial judge. It may be worth considering an instruction to the jury, reflected on the interrogatory form, that the interrogatory concerning specification of predicate acts is to be answered only in the event that the jury has agreed upon a general verdict of guilty. This approach enables the jury to perform its generalized task first, responding to the interrogatory thereafter only if a guilty verdict reflects that the jury has found all the elements of an offense established, including the existence of at least two predicate acts.[4] See *United States v. Ogull, supra,* 149 F.Supp. at 275. Also worth considering, especially in a complicated case, is an instruction that in the event of a conviction the jury should endeavor to answer the interrogatory concerning predicate acts but need not feel obliged to respond as to every alleged act on what might be a long list. See *United States v. Diapulse Manufacturing corp.,* 389 F.2d 612, 614-15 (2d Cir.) (approving interrogatory that permitted jury to indicate some of the specifications it found established in libel action for condemnation of misbranded product), *cert. denied,* 392 U.S. 907, 88 S.Ct. 2059, 20 L.Ed.2d 1365 (1968). And I assume that in every case

4. I assume that the jury, if it votes to convict, would be instructed to proceed immediately to consideration of the interrogatory, and report both its general verdict and its interrogatory responses simultaneously, rather than seriatim, as the First Circuit has suggested, *United States v. Spock, supra,* 416 F.2d at 183, n. 42.

the trial judge has the discretion not to use an interrogatory at all if persuaded that its use under the circumstances risks prejudice to the defendant.

II. Santora's Conviction on Count One

The majority reverses Santora's conviction on Count One, charging a RICO conspiracy in violation of 18 U.S.C. § 1962(d) (1982), because of the legal insufficiency of one of the eight predicate acts alleged in that count of the indictment. I agree that predicate act 5m is legally insufficient because the offense there alleged, a conspiracy to violate 18 U.S.C. § 1955 (1982), is not within the definition of "racketeering activity" set forth in section 1961(1). I respectfully dissent, however, from the majority's ruling that the legal insufficiency of predicate act 5m requires reversal of Santora's conviction on Count One.

At trial Santora made no attempt to withdraw predicate act 5m from the jury's consideration.[5] I would hold that his failure to object waived the deficiency of which he now complains.

It is a familiar rule that a conviction must be set aside whenever the jury's verdict rests on alternative bases, one of which is invalid, and it cannot be determined with adequate confidence that the jury relied

5. Santora's objection to Count One in its entirety on the ground that conspiracies may not be alleged as predicate acts to a RICO conspiracy charge does not suffice to call the trial judge's attention to a deficiency that concerns only one of the predicate acts. See *United Sttes v. Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948) (motion to dismiss a perjury count does not suffice as an objection pertinent to only one of four specifications of perjury).

on the valid basis. *See Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). That rule, however, is usually invoked when the defendant has alerted the trial court to his objection to the submission of the invalid basis to the jury.[6] In the absence of objection, we have consistently held that the defendant has waived the defect in one basis of a count and that the existence of a valid alternative basis for conviction warrants affirmance. *United States v. Cunningham*, 723 F.2d 217 No. 83-1046 (2d Cir. Nov. 28, 1983); *United States v. Mowad*, 641 F.2d 1067 (2d Cir.), *cert. denied*, 454 U.S. 817, 102 S.Ct. 94, 70 L.Ed.2d 86 (1981); *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976); *United States v. Bonacorsa*, 528 F.2d 1218 (2d Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2647, 49 L.Ed.2d 386 (1976); *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976); *United States v. Goldstein*, 168 F.2d 666 (2d Cir. 1948); *United States v. Mascuch*, 111 F.2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650, 61 SCt. 14, 85 L.Ed. 416 (1940). The majority distinguishes this line of authority on the ground that in each case the reason that one alternative basis for conviction was invalid was insufficiency of evidence. For lack of evidence, one of several specifications of perjury was sought to be challenged for the

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6. In *Stromberg v. California, supra*, in which the Supreme Court found unconstitutional a state ban on displaying a red flag for one of the three purposes proscribed by the state statute, the defendant, who had been charged with displaying a red flag for all three proscribed purposes, was deemed to have made an objection in the trial court that related to the validity "not merely of the statute taken as a whole, but of each one of the three clauses separately relied upon by the State in order to obtain aconviction." 283 U.S. at 365, 51 S.Ct. at 534.

first time on appeal in *Cunningham*, *Bonacorsa*, *Natelli*, *Goldstein*, and *Mascuch*, and one of several objectives of a conspiracy was challenged in *Dixon* and *Mowad*. At most, the majority's distinction requires us now to consider whether the legal deficiency of an alternative basis for a conviction is waivable in the same manner as an evidentiary deficiency. The fact that our prior cases have found waiver when the deficiency was evidentiary is no reason to rule against waiver in this case where the deficiency is one of law.

Confronting the issue, I see no valid argument against waiver. One of several alternative bases for conviction is just as invalid whether the deficiency is lack of evidence or lack of criminality under the pertinent statute. When the defect is lack of evidence, we subject the defendant to the risk that the jury may have rested its decision solely on the invalid basis, for example, a specification of a perjury charge. We do not permit the defendant to withhold his objection until appeal. We assume that the trial judge would have withdrawn the invalid basis from the jury's consideration if asked to do so, and we further assume, in the absence of objection, that the conviction adequately rests on the valid bases. The same reasoning should apply here where the invalid basis arises because one of several RICO predicate acts is not within the statutory definition of "racketerring activity." Of course we would notice as plain error a defect in an indictment arising from the omission of a significant aspect of the offense alleged, if the omitted aspect had not been framed for jury consideration by the instructions. That rule underlies our reversal of Tomasulo's conviction on Count One, because the invalidity of one of the predicate acts he is alleged to have committed leaves only one other predicate act charged to him; he

has therefore been convicted without an allegation or proof of having committed two valid predicate acts. But Santora was alleged in Count One to have committed seven valid predicate acts, and the evidence sufficed to permit his conviction. There is simply no reason to permit him to raise for the first time on appeal the invalidity of one predicate act when any two of the remaining seven support his conviction.

Even if the waiver rule of *Dixon* and *Natelli* should not generally be applied unless the defect in an alternative basis for conviction is insufficiency of evidence, there are compelling circumstances warranting a finding of waiver in this case. The only plausible argument against waiver, possibly valid in some cases, is that there might be too great a risk that the jury would not have convicted on the valid basis if the invalid basis had been objected to and withdrawn from the jury's consideration. That risk is illusory in this case. It is totally unrealistic to think that the jury that convicted Santora on Count One after hearing evidence against him involving the seven valid predicate acts charged in that count—four murder conspiracies, two drug conspiracies, and one robbery conspiracy—would have hesitated even momentarily in reaching a guilty verdict had they not been permitted to consider the eighth predicate act—conspiracy to violate the federal gambling statute.

Furthermore, the jury convicted Santora on Count Two, which charged a substantive RICO violation, 18 U.S.C. § 1962(c) (1982). That verdict demonstrates that the jury found beyond a reasonable doubt that Santora had committed at least two of the eight predicate acts alleged in that count, none of which is deficient in any respect. The majority rejects

the Government's argument that the jury's finding of at least two predicate acts under Count Two may be enlisted to support the conviction on Count One. To do so, the majority contends, permits the Government to violate traditional rules of pleading that require a conviction on any one count to be based only on the allegations set forth in that count. But the issue here is not whether the Government is entitled to some extra benefit that may be in violation of rules of pleading; rather, the issue is whether the defendant should be relieved of the consequences of his own failure to object to the legal invalidity of one of the eight predicate acts alleged in Count One. The jury's guilty verdict on Count Two, necessarily finding that Santora committed at least two acts of racketeering, eliminates entirely any risk that the jury would not have convicted him on Count One if predicate act 5m had been withdrawn.

I therefore dissent from the reversal of Santora's conviction on Count One. In all other respects, I concur in the Court's opinion.

DECISION OF THE DISTRICT COURT ON POST-TRIAL MOTIONS DATED NOVEMBER 12,1982

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK 81 Cr. 803 (RWS)

UNITED STATES OF AMERICA,

v.

DOMINICK NAPOLITANO, BENJAMIN RUGGIERO, JOSEPH MESSINA, ANTHONY RABITO, NICHOLAS SANTORA, JAMES EPISCOPIA, ANTONIO TOMASULO, JOHN CERASINI, DENNIS MULLIGAN, VINCENT LOPEZ AND VINCENT PITEO,

Defendants.

John S. Martin, Jr., United States Attorney for the Southern District of New York, New York City, for the United States; Barbara S. Jones, Louis J. Freeh, Assistant United States Attorneys, New York City, of counsel.

Paul Rao, New York City, for defendant Rabito.

Irwin Klein, New York City, for defendant Tomasulo.

SWEET, District Judge.

After a five-week multi-defendant jury trial, defendant Anthony Rabito ("Rabito") was found guilty on two counts of a four-count indictment. Defendant Antonio Tomasulo ("Tomasulo") was found guilty on one count. Rabito had been charged in three of the counts with participation in a racketeering conspiracy in violation of 18 U.S.C. § 1962(d) (Count One) (hereinafter referred to as "RICO"), possession with intent to distribute methaqualone in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) (Count Three), and conspiracy with intent to distribute methaqualone in violation of 21 U.S.C. § 846 (Count Four). Tomasulo had been charged in only the RICO count. Rabito was named in five predicates in the RICO count, one involving his methaqualone activities, the other four involving murder conspiracies. Tomasulo was named in two predicates, one involving a conspiracy to distribute methaqualone, the other involving a conspiracy to conduct a gambling business in violation of 18 U.S.C. § 1955.

Rabito was found guilty on Counts Three and Four, and not guilty on the RICO count. Tomasulo was found guilty on the one count he was charged with. Both Rabito and Tomasulo now move pursuant to Fed.R.Crim.P. 29(c) and 33 for judgment of acquittal, or in the alternative for a new trial, respectively. For the reasons stated below, the motions will be denied.

Rule 29 Motions

A motion for judgment of acquittal is addressed to the sufficiency of the Government's evidence. The classic formulation of the test, adopted in this circuit, requires the court to:

> determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weight the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilty beyond a reasonable doubt.

United States v. Lieberman, 637 F.2d 95, 104-05 (2d Cir. 1980), (*quoting Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947)). The evidence is viewed in the light most favorable to the Government. *United States v. Stirling*, 571 F.2d 708 (2d Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978).

Rabito

Applying this standard to Rabito, his Rule 29 motion must be denied. He was found guilty of substantive and conspiracy charges involving possession of methaqualone with intent to distribute. The Government's evidence consisted of numerous wiretap recordings of Rabito in which he used jargon which expert testimony by a qualified Government witness showed referred to dealings in methaqualone. Also, surveillance testimony by FBI agents implicated Rabito in a scheme to deal in methaqualone.

Rabito challenges the sufficiency of this evidence primarily on the ground that it failed to establish that the pills Rabito was dealing in contained a controlled substance, the "look alike" theory. Specifically, Rabito claims that because the Government did not introduce any physical evidence to show that the pills contained methaqualone, a reasonable juror could not find Rabito guilty beyond a reasonable doubt. From the evidence taken as a whole, however, *United States*

v. Taylor, 464 F.2d 240, 244 (2d Cir. 1972), the jury was entitled to infer that Rabito was dealing in a controlled substance even though the evidence was circumstantial. *United States v. Barnes,* 604 F.2d 121, 156 (2d Cir. 1979), *cert. denied,* 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980).

Rabito also claims that it is "paradoxical" that he was found guilty of both Counts Three and Four, while his co-defendant Nicholas Santora was only convicted on Count Four. There is no inconsistency in these results. The evidence against Rabito and Santora was different. It was not unreasonable for the jury to conclude from the evidence that Santora was not guilty of the substantive offense, but that his activities were those of a co-conspirator.

Tomasulo

Preliminarily, it is necessary to dispose of Tomasulo's argument that only substantive offenses can act as predicates to a RICO conviction. This argument is irrelevant in this case because Tomasulo was found guilty of violating 18 U.S.C. §1962(d), which makes it "unlawful for any person to *conspire* to violate any of the" substantive provisions of the statute. Indeed, our Court of Appeals has held that a conspiracy can properly be charged as a predicate act of racketeering under section 1962(c), one of the substantive sections of the statute. *United States v. Weisman,* 624 F.2d 1118, 1123-24 (2d Cir.), *cert. denied,* 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980).

Tomasulo challenges the sufficiency of the Government's evidence on two grounds: first, that the

Government failed to prove the existence of a single "enterprise," and second, that the evidence was insufficient to establish Tomasulo's participation in the racketeering conspiracy. Applying the standard outlined above, the Government's evidence in this case was sufficient to enable a reasonable juror to find Tomasulo guilty on the RICO count beyond a reasonable doubt.

To secure a RICO conviction the Government must prove the existence of an "enterprise" by evidence of an ongoing organization and by evidence that the various associates function as a continuing unit. *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). Proof of these elements is required to avoid the danger created by RICO of guilt by association. *United States v. Bledsoe,* 674 F.2d 647, 664 (8th Cir. 1982). Tomasulo claims that the indictment in this case merely "strung together" thirteen separate and distinct crimes with the only nexus among them being "a common key figure or two," and that the Government's proof failed to establish an enterprise. There was substantial proof, however, adduced from the testimony of Government witnesses, and tape-recorded and photographic evidence to allow the jury to conclude beyond a reasonable doubt that an enterprise existed that had distinct characteristics, functioned as a continuing unit, had an ascertainable structure, and whose associates had a common or shared purpose. *Cf. id.* at 664-65. Indeed, the Government's contention that the defendants' participation in the "Bonanno Family of La Cosa Nostra" is the classic example of the type of enterprise that RICO was designed to encompass. *Id.* at 665.

Tomasulo's argument that the evidence was insufficient to establish his participation in the racketeering conspiracy also fails. The indictment alleged two predicates, one involving a conspiracy to distribute methaqualone, the other a gambling conspiracy. As to the drug conspiracy, the Government presented evidence of Tomasulo's participation in the form of testimony by an undercover FBI agent, and two tape-recorded conversations involving methaqualone transactions in which Tomasulo was a participant. As to the gambling conspiracy, the Government offered the testimony of two undercover FBI agents, an expert witness in gambling who analyzed various wiretap recordings, and several of the recordings themselves. Viewing this evidence in the light most favorable to the Government, which is required for the purposes of this motion, *United States v. Stirling, supra*, 571 F.2d at 733, there was sufficient evidence to allow a reasonable juror to conclude guilt beyond a reasonable doubt. The FBI agents' testimony, which must be credited, tends to establish Tomasulo's participation in both conspiracies. The tape-recorded conversations, in which Tomasulo participated and in which reference was made by others to Tomasulo's activities, corroborate his participation.

Rule 33 Motions

Rabito

Rabito argues in support of his Rule 33 motion that he is entitled to a new trial on two grounds. First, he claims that the guilty verdict on Counts Three and Four is contrary to the weight of the evidence. As discussed above, however, the evidence presented was sufficient to enable a reasonable juror to conclude that Rabito was guilty beyond a reasonable doubt.

Rabito's second argument in support of his motion for a new trial is that he was prejudiced by "spillover" from the RICO count, of which he was acquitted. In effect, Rabito argues that this court's denial, in an opinion dated June 25, 1982, of his pretrial motion for severance pursuant to Fed.R.Crim.P. 8 & 14 was improper. That motion was denied because the defendants had failed to carry their burden of showing substantial prejudice from a joint trial. *See United States v. Napolitano,* No. 81 Cr. 803, slip op. at 4-5 (S.D.N.Y. June 25, 1982), and cases cited therein.

Rabito bears the same burden in making this motion after the trial, and has again failed to sustain it. His basic contention is that most of the proof at trial was directed at the RICO count, of which he was acquitted, and that the jury was therefore "subliminally influenced" to find him guilty on Counts Three and Four. The evidence to support Counts Three and Four, however, as noted above, was not insubstantial. Rabito has not demonstrated substantial prejudice, *United States v. Borelli,* 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied,* 401 U.S. 946, 91 S.Ct. 963, 28 L.Ed.2d 229 (1971), but has merely made a bald assertion that he would have fared better had he been tried alone, *United States v. Magnano,* 543 F.2d 431, 435 n. 2 (2d Cir. 1976), *cert. denied,* 429 U.S. 1091, 97 S.Ct. 1100, 51 L.Ed.2d 536 (1977). There is no indication beyond Rabito's bare contention that the jury was not able to follow this court's instructions and compartmentalize the evidence against each defendant. Indeed, the fact that Rabito was acquitted of the RICO count is itself a strong indication that it was able to separately consider the evidence. *See United States v. Kennedy,* 564 F.2d 1329, 1334-35 (9th Cir. 1977), *cert.*

denied, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978).

Rabito relies heavily on *United States v. Guiliano*, 644 F.2d 85 (2d Cir. 1981). This reliance is misplaced. In *Guiliano*, the defendant had been convicted after a jury trial on a RICO count and on two counts of bankruptcy fraud. The Court of Appeals reversed one of the bankruptcy fraud convictions because the evidence to support it was insufficient. Because that count was one of the two predicates supporting the RICO count, that conviction was also reversed. In addition, although the court found sufficient evidence to support the other fraud count, it ordered a new trial "because of the distinct risk that the jury was influenced in its disposition of this count by improper evidence and by the allegations of the RICO count." *Id.* at 88-89. The court noted that:

> [o]ne of the hazards of a RICO count is that when the Government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with the label of "racketeer" tainted the conviction on an otherwise valid count.

Id. at 89. The court then went on to explain that:

> [t]hat claim, of course, need not always or even often prevail, but it does in this instance when the evidence was barely sufficient to permit an inference of the disputed element of knowledge and considerable prejudice was injected by placing Guiliano at the store just before the fire.

Id.

The spillover claim does not prevail here. There are two critical distinctions between this case and Guiliano. First, Rabito was found not guilty by the jury on the RICO count, whereas in *Guiliano* the jury improperly convicted on the RICO count on the basis of insufficient evidence. Therefore, this case is like *United States v. Sam Goody, Inc.*, 675 F.2d 17 (2d Cir. 1982), in which the court noted that:

> we think the likelihood that the jury's deliberations were tainted by the RICO allegation is far less than the likelihood found in *Guiliano,* for here, unlike *Guiliano,* the jury acquitted on the RICO count that was submitted to it, and the district court found there was sufficient evidence to support all of the guilty verdicts that were rendered.

Id. at 27 n. 9. *See also id.* at 29 (Mansfield, J., concurring in part and in the result) (distinguishing *Guiliano* from situation where jury acquits on RICO count). Second, in *Guiliano,* the spillover claim as to one of the non-RICO counts prevailed because the evidence was "barely sufficient" to support one of the elements of the charge, and because evidence of scant probative value, but with considerable potential for prejudice, was admitted to support the charge. 644 F.2d at 88-89. Here, the evidence against Rabito was properly admitted, and was sufficient to support the jury's verdict.

Tomasulo

Tomasulo also claims that he is entitled to a new trial because of prejudicial "spillover." His claim is different from Rabito's, however, in that he does not claim that spillover from another count prejudiced his right to a fair trial on the RICO count. Rather, he

argues that the predicates to the RICO count involving the murder conspiracies, in which Tomasulo was not named, spilled over and prejudiced him regarding the drug and gambling conspiracies. As outlined above, there must be a showing of substantial prejudice to sustain this claim.

Tomasulo's sole argument is that the disparity in the proof offered to establish the murder conspiracies, as opposed to the proof offered to establish his methaqualone and gambling activities, prejudiced his right to a fair trial. Disparity in the proof is not alone a sufficient ground either for severance prior to trial, or for a new trial after a guilty verdict. There must still be a showing of prejudice. *See United States v. Corr,* 543 F.2d 1042, 1052-53 (2d Cir. 1976); *United States v. Gilbert,* 504 F.Supp. 565, 566-67 (S.D.N.Y. 1980). *See also United States v. Aloi,* 511 F.2d 585, 598 (2d Cir.), *cert. denied,* 423 U.S. 1015, 96 S.Ct. 447, 46 L.Ed.2d 386 (1973). Tomasulo has not made such a showing. While he was not named in the murder conspiracy predicates, there was a continuing relationship between him and the other defendants that justified trying them all together. *See United States v. Capra,* 501 F.2d 267, 281 (2d Cir. 1974), *cert. denied,* 420 U.S. 990, 95 S.Ct. 1424, 43 L.Ed.2d 670 (1975). Also, the evidence was not "so little or so 'vastly disproportionate' " to that admitted against the other defendants so as to require severance. *Id. (quoting United States v. Rizzo,* 491 F.2d 215, 218 (2d Cir.), *cert. denied,* 416 U.S. 990, 94 S.Ct. 2399, 40 L.Ed.2d 769 (1974)).

Most significantly, the jury apparently was able to follow this court's instructions and considered the evidence separately against each defendant. This is

evidenced by the fact that Rabito was acquitted of the RICO count, and the fact that defendant John Cerasani was acquitted altogether.

In a "supplemental" motion Tomasulo also requests a new trial on the basis of newly discovered evidence. The evidence consists of a Research Study published in 1980 by the Institutional Research and Development Unit of the FBI entitled "The Special Agent in Undercover Operations: A Study of the Selection, Supervision, Administration and Stressors Associated with Undercover Assignments." Counsel for Tomasulo explains that the existence of the study has "just come to [his] attention," and that the report would have been "tellingly utilized" in the cross-examination of agent Pistone.

The Government responds by affidavit that neither the members of the prosecution team nor the FBI Special Agent in charge of the investigation leading to this prosecution were aware of the Study prior to this motion. Freeh aff. pars. 3 & 4. Indeed, the study is classified. *Id.* at 3.

In any event, Tomasulo's contentions that the study would have been "tellingly utilized" to test credibility, and that "the case would have been tried differently" had the study been produced, do not warrant granting the motion for a new trial:

> [S]uch a motion "should be granted only with great caution" and only upon a showing that the evidence could not with due diligence have been discovered before or during trial, that the evidence is material, not cumulative, and that admission of the evidence would probably lead to an acquittal.

United States v. Alessi, 638 F.2d 466, 479 (2d Cir. 1980) (citations omitted). This court has conducted an *in camera* review of the Study, and concludes that it does not measure up to this exacting standard. At most, it would be used on cross-examination to explore the stress under which an undercover agent operates, an area that was fully probed at the trial. Thus, it would be cumulative. More importantly, it is inconceivable that use of the Study at a new trial "would probably lead to an acquittal." The study is a general profile of the undercover agent and the stress he operates under. It does not refer specifically to any individuals or operations. Therefore, its probativeness is questionable.

Tomasulo's contention that the nondisclosure of the Study violates the doctrine of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is meritless. Since Tomasulo made no specific request for this material,[1] he must show that the Study, viewed in the context of the entire record, creates a reasonable doubt that otherwise would not exist. *Ostrer v. United States*, 577 F.2d 782, 786 (2d Cir. 1978) (citing *United States v. Agurs*, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 2401-02, 49 L.Ed.2d 342 (1976)). As outlined above, the material in the study does not rise to this level.

For the reasons stated above, the motions of both Rabito and Tomasulo are denied.

IT IS SO ORDERED.

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1. Rabito requested pre-trial disclosure of "psychiatric, mental and medical records of both undercover agents herein, from the commencement of their undercover activities to date. Together with FBI procedures, regulations and directives pertaining to the length of term of undercover activity." Subpoena dated July 10, 1982. The Study does not fit this description.

DECISION OF THE DISTRICT COURT ON PRE-TRIAL MOTIONS DATED JULY 15, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
81 Cr. 803 (RWS)

UNITED STATES of America,

v.

Dominick NAPOLITANO, Benjamin Ruggiero, John Cerasani, Nicholas Santora, James Episcopia, and Antonio J. Tomasulo, Defendants.

John S. Martin, Jr., United States Attorney for the Southern District of New York for the United States; Barbara S. Jones, Assistant United States Attorney, New York City, of counsel.

Robert Koppelman, New York City, for defendant Ruggiero.

David Breitbart, New York City, for defendant Cerasani.

Lewis Cohen, Brooklyn, N.Y., for defendant Santora.

Irwin Klein, New York City, for defendant Tomasulo.

Meyer, Light, London & Lopez, Brooklyn, N.Y., for defendant Episcopia; Frank A. Lopez, Brooklyn, N.Y., of counsel.

Paul P. Rao, Jr., New York City, for defendant Rabito.

Joseph Klempner, New York City, for defendant Mulligan.

Barry Slotnick, New York City, for defendant Piteo.

SWEET, District Judge.

The government moves for a deferral of discovery and a Speedy Trial Act continuance pursuant to the interest of justice provision, 18 U.S.C. §3161(h)(8)(A). This is a six defendant, two count indictment charging violations of the Rico Statute, 18 U.S.C. §1962(c) & (d). The pattern of racketeering in the conspiracy and substantive counts is based on allegations of murder, armed robbery, narcotics, and gambling.

The procedural history relevant to this application starts with the arrest of defendant Ruggiero on August 29, 1981. On September 9, 1981, pursuant to 18 U.S.C. §3161(h)(8), the government applied for and received a thirty day continuance, thereby postponing the date for a preliminary hearing or indictment. The government cited to the complex nature of the case, the need to protect an ongoing undercover investigation, and the extensive evidence, including electronic surveillance, which required analysis prior to indictment. On October 8, 1981, the government applied for and received an additional forty-five day delay of the date for a preliminary hearing or indictment on essentially the same basis as the initial motion and in addition, on the need to procure grants of immunity from Washington for several grand jury witnesses and to coordinate with investigations in the Southern District of Florida.

On November 23, 1981, the defendants were indicted. A pretrial conference was held on December 3, 1981, at which time it was determined that the government would complete its voluntary discovery by January 5, 1982, at which time another pretrial conference would be held, and a schedule for defense motions and trial would be fixed. On December 28, 1981, the government filed a notice of motion to submit a statement ex parte for the purpose of a deferral of discovery and a Speedy Trial Act continuance. On January 5, 1982, this court permitted the submission of an ex parte affidavit, which details the progress of the investigation underlying this case. Attached to this affidavit were the two prior ex parte affidavits which had been submitted by the government to obtain the two pre-indictment continuances totalling seventy-five days.

In essence, the government seeks to defer discovery of certain body consent tapes, Title III recorded statements, and videotaping relating to the Florida proceedings as well as to this action until January 31, 1982, for purposes of coordination. Additionally, the government seeks to defer discovery of certain other Title III interceptions for ninety days. The government again cites the unusual and complex nature of the action, the requirements of coordinating with procedings in Florida and the real possibility that these matters may result in a superseding indictment. It is appropriate to consider these factors in light of 18 U.S.C. §3161(h)(8) and the particular facts presented.

Section 3161(h)(8)(A) provides that a judge may grant a "continuance on the basis of his findings that the ends of justice served by taking such action

outweigh the best interest of the public and the defendant in a speedy trial." Whether injustice would result from the failure to grant a continuance, whether the case is so complex due to the nature of the prosecution, and whether effective preparation would be denied by the failure to grant a continuance, are all factors to be considered in deciding the government's motion. 18 U.S.C. §3161(h)(8)(B).

The government's request to withhold the material based on the Florida investigation is granted. In view of the severity of the charges and the complexities of coordinating investigations, the interest of justice requires that the government be granted a deferral of this discovery until January 31, 1982. This time will be excluded under the Speedy Trial Act, 18 U.S.C. §3161(h)(8).

The government's request for the deferral of discovery relating to certain additional interceptions warrants separate consideration. Despite the complexity of the evidence and the lengthy undercover investigations requiring detailed analysis and presentation, the material is not new and indeed, has formed the basis of the government's second request for a pre-indictment continuance of forty-five days.

To deny the continuance would mandate disclosure of materials which would impede an ongoing significant investigation. Confronted with a similar, but less complicated situation in *United States v. Mannino,* 480 F.Supp. 1182, 1188 (S.D.N.Y. 1979), this court granted the government's request to permit a comprehensive analysis of evidence betokening serious criminal charges, recognizing a public interest in such an analysis. Requiring the government

either to disclose the materials, thereby adversely impacting on its present investigation, or to dismiss the current indictment and to reindict would jeopardize this interest, which predominates in this situation over the public's interest in prompt disposition of criminal cases and over defendants' interest in obtaining a speedy trial.

In light of these findings, I conclude that the ends of justice served by a continuance outweigh other interests protected by the Act. *See United States v. Fielding,* 645 F.2d 719, 721-22 (9th Cir. 1981). Therefore, the government's request to defer discovery of this additional material is granted to the extent that it may be withheld until February 24, 1982.

A pretrial conference will be held on February 24, 1982 at 4:30 p.m. in courtroom 302.

IT IS SO ORDERED.

ON MOTION TO REDUCE BAIL

The February 24, 1982 letter of counsel having been treated as a motion to reduce bail previously set for defendant Benjamin Ruggiero ("Ruggiero") is denied.

Ruggiero was arrested on August 29, 1981. According to his counsel, Ruggiero had been advised some time previously by an undercover agent that serious charges would be brought against him. An indictment charging him with a pattern of racketeering in violation of 18 U.S.C. §1962 was filed on November 23, 1981. For reasons previously set forth, the time for

discovery, pretrial motions and the trial have been extended. These motions will be heard on April 30 and May 28, 1982, and it is hoped that the trial can be set within a month of the disposition of the anticipated motions. Clearly the case is complicated, and the evidence is claimed by the Government to be extensive. Ruggiero is also under indictment in Milwaukee for racketeering in violation of 18 U.S.C. §1951. Although there may be some evidentiary overlap on the New York and Milwaukee cases, except as set forth below, the decisions relating to the instant case have been made independently of the other proceedings in which Ruggiero may be involved.

On December 3, 1981, after the action had been assigned to me, an application was made to reduce the bail which was granted, and bail was fixed in New York at $150,000 cash or surety. Bail in Milwaukee remained at $150,000 cash or surety. Thereafter Ruggiero sought certain medical treatment which gave rise to a number of applications which included requests to reduce bail which were denied.

Then after consultation with the District Court of the Eastern District of Wisconsin, bail conditions were modified to $200,000 personal recognizance bond in Milwaukee and $200,000 cash or surety in New York.

Ruggiero asserts a stable family, the need for continuing medical care, the opportunity for employment, and the ability to prepare his defense as the principal reasons for eliminating the cash or surety provisions of the current bail. He points out without contradiction from the Government that despite knowledge of the pendency of these charges he did not flee the

jurisdiction though he had ample opportunity to do so.

The Government in opposing the application points out the seriousness of the charges, the pendency of other serious charges elsewhere, and notes the absence of Dominick Napolitano, who is currently a fugitive to underscore the possibility of such a course of action. The Government also places heavy emphasis on its information that Ruggiero is the subject of a "contract" and that he would be killed if released on bail. Assuming the information concerning the threat to Ruggiero's life to be accurate, I decline to reach the question whether or not to deny bail in order to insure his presence at trial in the face of these alleged threats. The information is, of course, relevant on the question of flight, and it is for that reason that knowledge of this threat is advanced by the Government.

Obviously, decisions as to the amount and form of bail are difficult and discretionary, dealing as they do with past conduct and present conditions as predictors of future behavior. Of course, this difficulty is deepened by the duration of the denial of liberty which has resulted here as an unhappy consequence of the complicated nature of this proceeding. Nor can I completely disregard the fact that certain of the other defendants have posted substantial bail. However, though obviously interrelated, the criteria for these various decisions regarding bail and the setting of trial schedules must be kept separate.

With all the circumstances in mind and considering principally the severity of the charges and the possible consequences, I decline to grant the motion to reduce bail.

IT IS SO ORDERED.

ON MOTION TO DISMISS INDICTMENT

Defendant James Episcopia ("Episcopia") moves pursuant to Rule 12(b) Fed.R.Cr.P. to dismiss counts one and four of the indictment alleging violations of 18 U.S.C. §1962(d) and 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A). For the following reasons, the motion is denied.

In moving to dismiss count one, Episcopia contends that the indictment failed to establish that the Bonanno Family of La Cosa Nostra is an enterprise within the meaning of 18 U.S.C. §1962 or that Episcopia was a member of the enterprise. In considering a motion to dismiss a count in an indictment, the allegations must be accepted as true. *United States v. Whalen*, 337 F.Supp. 1012, 1017 (S.D.N.Y. 1972); *accord United States v. Gulf Oil Corp.*, 408 F.Supp. 450, 462 (W.D.Pa. 1975). Rule 12(b) Fed.R.Cr.P. pertains to requests which are "capable of determination without the trial of the general issue." No attack has been made upon the indictment as being insufficient in law in this regard. The issues raised by Episcopia with regard to count one must therefore be deferred until the trial of this case on the merits. Rule 12(e), Fed.R.Cr.P., *see United States v. Callahan*, 300 F.Supp. 519, 522 (S.D.N.Y. 1969); *United States v. Fargas*, 267 F.Supp. 452, 455 (S.D.N.Y. 1967).

Additionally, Episcopia contends that because count four of the indictment charges him with a conspiracy to distribute quaaludes in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and because count one lists this conduct as a predicate offense, the indictment places him in double jeopardy. However, the

Second Circuit has held that separate convictions and sentences may be determined for "a RICO offense and the underlying or predicate crimes which make up the racketeering pattern." *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 103, 66 L.Ed.2d 38 (1980).

Therefore, Episcopia's motions to dismiss counts one and four of the indictment are denied.

IT IS SO ORDERED.

ON MOTIONS TO SUPPRESS

Numerous substantive motions have been filed in this action involving eleven defendants. The indictment charges violations of the RICO statute, 18 U.S.C. §§1962(c) & (d) as well as possession and distribution of quaaludes in violation of 21 U.S.C. §§812, 841(a)(1) & 841(b)(1)(A) and 18 U.S.C. §2, and conspiracy in violation of 21 U.S.C. §846. Each motion will be dealt with separately.

Defendants move pursuant to 18 U.S.C. §2518(10)(a) and Rules 12(b)(3) and 41(f) Fed.R.Cr.P. to suppress the evidence obtained by means of electronic surveillance and eavesdropping. For the reasons set forth below this motion is denied. Additionally the defendants assert that the government has failed to comply with the minimization requirements of 18 U.S.C. §2518(5) and defendants request a hearing on this issue which request will be granted in accordance with this memorandum opinion.

Defendants challenge sufficiency of the government's application for electronic surveillance and its allegation of particularized need and probable cause for the surveillance. Section 2518(1)(c) mandates that

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

18 U.S.C. §2518(1)(c). In interpreting this statute the Supreme Court has stated that this provision "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153, 94 S.Ct. 977, 983, 39 L.Ed.2d 225 (1974).

In formulating standards to determine whether the government's application for electronic surveillance is sufficient to indicate the inadequacy of other investigative techniques, the Second Circuit has realized the difficulty in providing specifics "[when] one endeavors to prove a negative." *United States v. Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975) (other means unlikely to reveal the *scope* of the operation is sufficient), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). Consequently it has refused "to set impossibly burdensome standards." *Id.*

In reviewing alleged violations of wiretap orders issued pursuant to N.Y.Crim. Proc. Law §§700.15(4) and 700.20(2) (McKinney), which the court has noted is equivalent to the federal wiretap statute at issue here 18 U.S.C. §2518(1)(c), *United States v. Fury*, 554 F.2d 522, 529 n. 6 (2d Cir. 1977), *cert. denied*, 436 U.S.

931, 98 S.Ct. 2831, 56 L.Ed.2d 776 (1978); *Unitd States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied*, 429 U.S. 1066, 97 S.Ct. 796, 50 L.Ed.2d 783 (1977), the Second Circuit has held that the purpose of the requirements "is not to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents." *United States v. Hinton*, 543 F.2d at 1011; *see United States v. Fury*, 554 F.2d at 530. In order to satisfy the statute the application for electronic surveillance must inform the court of the " 'nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods.' " *United States v. Scafidi*, 564 F.2d 633, 641 (2d Cir. 1977), (*quoting United States v. Hinton*, 543 F.2d at 1011), *cert. denied*, 436 U.S. 903, 98 S.Ct. 2231, 56 L.Ed.2d 401 (1978).

Moreover this Circuit has adopted the standard set forth in the legislative history of the statute that the "required showing is to 'be tested in a practical and common sense fashion.' " *United States v. Fury*, 554 F.2d at 530 (*quoting* S.Rep. No. 1097, 90th Cong.2d Sess., *reprinted in* [1968] U.S. Code Cong. & Ad. News 2112, 2190). This "commonsense" approach is consistent with the reasonableness standard which states that

> an affidavit is not insufficient because it did not prove beyond a shadow of a doubt that ordinary techniques will fail or that their use will result in a loss of life or some equivalent disaster. The standard of reasonableness should be employed in measuring the affidavit against the statutory requirements.

United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977), *see United States v. Hyde*, 574 F.2d 856,

867 (5th Cir. 1978); *United States v. Daly,* 535 F.2d 434, 438 (8th Cir. 1976); *United States v. DePalma,* 461 F.Supp. 800, 812-14 (S.D.N.Y. 1978); *United States v. Baker,* 443 F.Supp. 526, 529 (S.D.N.Y. 1977).

The electronic surveillance orders are therefore measured under these standards and against the scope and complexity of the investigation being undertaken. Here at the outset the investigation involved over six years of undercover activities by the FBI in connection with unlawful activities conducted by members of organized crime associations throughout the United States. Particularly, agents of the FBI are alleged to have infiltrated one of the criminal enterprises and have gathered information of among other things, gambling, bookmaking and loansharking operations, distribution of stolen goods and narcotics and several murders.

The affidavits submitted with each application state that "[n]ormal investigative techniques have been discounted" because confidential informants have limited contact with the subjects of the investigation, are not in a position to gain direct material knowledge of the activities of the criminal enterprise and will not testify concerning the investigation. Physical surveillances as well as pen registers and subscriber information corroborate the whereabouts of individuals but could not establish elements of the criminal activity. Additionally, the homogeneous neighborhood in which limited physical surveillance occurred render it likely that subjects of the investigation would become aware that their activities were being investigated. Confidential sources indicated defendants' suspicions concerning surveillance. Moreover, the broad scope and insulated

nature of the criminal enterprise under investigation tended to establish that the undercover agent who operated primarily in Florida,[1] would not be able to obtain sufficient evidence to establish the scope of the New York based criminal activity. No further investigation by undercover agents concerning the alleged murders were planned due to risks to the safety of the special agents. Finally, search warrants, investigative grand juries and interviews of the subjects would result in publicity and the termination of the investigation.

In light of the information supplied in the affidavits, I conclude that the government has satisfied the statutory requirements of 18 U.S.C. §2518(1)(c) to set forth the need for electronic surveillance.

The defendants also move to suppress the electronic surveillance on the grounds that the government had failed to establish probable cause concerning the Rabito, Ruggiero, and Motion Lounge telephones and the Motion Lounge tap. A review of the affidavits indicates that this motion is meritless. An undercover FBI agent's penetration into the

1. At oral argument defendant Ruggiero challenged the factual allegation that the undercover agent operated primarily in Florida and argued that the agent lived in New York in close proximity to one of the premises being tapped and that the tapping was therefore unnecessary. The government responded that as asserted in the government's affidavits, the agent was located principally in Florida during the relevant period and that when in New York he stayed with defendant Napolitano, but he was not privy to the criminal activities at Napolitano's level. Defense counsel have cited no facts to challenge the role, location and sufficiency of the agent's investigation as set forth in the affidavit to warrant a hearing with respect to the agent's ability to obtain evidence without the electronic interceptions.

criminal enterprise forms the basis of government's recitation of facts sufficient to establish probable cause for the electronic surveillance orders.

With regard to the Loar affidavit concerning the Motion Lounge wiretap and bug, the undercover agent observed criminal activities at the Motion Lounge and Capri Car Service, communicated with the subjects of the investigation by calling them at the telephones at these premises to report "illegal" activities, and received information, corroborated by physical surveillances and pen registers, that these were two telephones used for illegal "business" activities.

With regard to the Siracusa affidavit concerning the Rabito wiretap, the information supplied by an informant was corroborated by the undercover agent's findings and by physical surveillances and pen registers. The informant's data meets the standards announced in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The affidavit satisfies the requirements that the informant's past record indicates reliability and credibility and that the informant's knowledge resulted from personal experiences. For some six years, the informant has provided information to the FBI concerning participants in organized crime in New York. During this time the FBI has independently corroborated this data. Additionally, he provided information which resulted in the arrest of fifteen persons, the convictions of ten, and the recovery of over $4,000,000 in stolen property. The informant is a criminal associate of the targets of the investigation, who was personally told by them that they used

Rabito as a conduit and could be contacted at certain times by calling Rabito's phone. Moreover, the subjects of the investigation also told the informant that Rabito used the telephone in reporting his criminal activities to them.

With regard to the Waltz affidavit concerning the Ruggiero telephone, the undercover agent was given this number by Ruggiero so that they could discuss the progress of the illegal activities. Pen registers also corroborated that Ruggiero's phone was used in making calls to the Motion Lounge.

This sampling of the material attested to in the affidavits, which was primarily supplied by an FBI undercover agent, is sufficient to establish probable cause to believe that the subjects named were involved in criminal activities and that criminal conversations related to these activities would occur over the wires.

In addition, to satisfy the statutory requirements to institute electronic surveillance, wiretapping and electronic surveillance must "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." 18 U.S.C. §2518(5); *see Scott v. United States,* 436 U.S. 128, 130, 98 S.Ct. 1717, 1719, 56 L.Ed.2d 168 (1978); *United States v. Donovan,* 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977). A determination as to whether minimization has been complied with requires an assessment of the reasonableness of the interceptions in light of the purpose of the wiretap and the totality of the circumstances of each case. *Scott v. United States,* 436 U.S. at 131, 139-40, 98 S.Ct. at 1720, 1724-25. Factors

to be considered include the scope of the conspiracy, duration and nature of the conversation, pattern of calls, stage of surveillance, and percentage of non-pertinent calls. *Id.* at 140-142, 98 S.Ct. at 1724-25. In an investigation which focuses on a "widespread conspiracy," more extensive surveillance is permitted. Minimization may be rendered impossible during short or ambiguous calls. Greater leeway is permitted during interception of non-pertinent conversations at the early stages of surveillance when agents have not been able to establish patterns of conversations. Interception may be reasonable when the percentage of non-pertinent calls (60%) is high. *Id.*

The government has the burden of proof in the first instance to show that surveillance was reasonable. *United States v. Rizzo,* 491 F.2d 215, 217 (2d Cir.), *cert. denied,* 416 U.S. 990, 94 S.Ct. 2399, 40 L.Ed.2d 769 (1974). The affidavits, periodic reports and daily logs which have been submitted to and reviewed by this court indicate that the government has established a prima facie showing of compliance with minimization standards. *United States v. Cirillo,* 499 F.2d 872, 880-81 (2d Cir.), *cert. denied,* 419 U.S. 1056, 95 S.Ct. 638, 42 L.Ed.2d 653 (1974). The defendants have to date failed to provide specific instances to challenge the government's submission. In light of the absence of any evidence of unreasonable interception, defendants were directed at oral argument on May 28, 1982 to specify their objections within ten (10) days and none such have been set forth, although defendant Ruggiero alleged that certain conversations were intercepted in violation of the marital privilege. In the event that particular interceptions are challenged and specified in writing within five (5) days, a hearing will be conducted.

IT IS SO ORDERED.

ON MOTIONS FOR SEVERANCE

Numerous motions have been filed by the defendants and the government in this criminal action involving eleven defendants, Dominick Napolitano ("Napolitano"), Benjamin Ruggiero ("Ruggiero"), Joseph Messina ("Messina"), Anthony Rabito ("Rabito"), Nicholas Santora ("Santora"), James Episcopia ("Episcopia"), Antonio Tomasulo ("Tomasulo"), John Cerasini ("Cerasani"), Dennis Mulligan ("Mulligan"), Vincent Lopez ("Lopez") and Vincent Piteo ("Piteo"). The four count indictment charges conspiracy to violate the RICO statute, 18 U.S.C. §1962(c), substantive violations of the same statute, 18 U.S.C. §1962(d), possession and distribution of quaaludes in violation of 21 U.S.C. §§812, 841(a)(1) & 841(b)(1)(A) and 18 U.S.C. §2, and conspiracy in violation of 21 U.S.C. §846. All defendants have joined in the motions of co-defendants whenever applicable. Each motion will be dealt with separately.

Severance

Defendants move for severances and for separate trials pursuant to Rules 8 and 14 Fed.R.Crim.P. These motions are denied. The indictment charges that each defendant was a member or associate of a criminal enterprise, the Bonanno Family of La Cosa Nostra, which engaged in various criminal activities constituting a pattern of racketeering.

Specifically, count 1 alleges that each defendant conspired to conduct and participate in the enterprise's activities through a pattern of racketeering in violation of 18 U.S.C. §1962(d). The pattern of racketeering claimed to be the subject of the con-

spiracy alleges 13 instances of criminal activities including four murders,[1] two thefts from interstate commerce,[2] four robberies,[3] two narcotics offenses,[4] and gambling.[5]

Count 2 charges six defendants[6] pursuant to 18 U.S.C. §1962(c) with substantive violations relating to the charges in count 1, including the murders, the thefts from interstate commerce, one of the robberies, the two narcotics offenses and the gambling. Count 3 charges three defendants[7] with

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1. Six defendants are named in Count 1 concerning the murders: Napolitano, Ruggiero, Messina, Rabito, Santora and Episcopia.

2. Four defendants are named with regard to the truck theft of tuna fish: Napolitano, Messina, Cerasani and Piteo. Three of these, Napolitano, Messina and Cerasani, are also named with regard to the truck theft of a clothing trailer.

3. Five defendants are named concerning the robbery of the apartment of the Shah of Iran's sister: Napolitano, Cerasani, Mulligan, Lopez and Piteo. Two defendants, Episcopia and Mulligan are named with regard to the robbery of the Landmark Union Trust Bank. Four defendants are named with regard to the robbery of the Pan Am Credit Union: Napolitano, Cerasani, Mulligan and Lopez. Five defendants are named with regard to the robbery of the Galerie Des Monnaies: Napolitano, Santora, Cerasani, Mulligan and Lopez.

4. Four defendants are named with regard to narcotics: Napolitano, Cerasani, Santora and Tomasulo. Additionally Santora and two other defendants, Rabito and Episcopia are named concerning a second narcotics violation.

5. Four defendants are named with regard to illegal gambling: Napolitano, Cerasani, Santora and Tomasulo.

6. Napolitano, Ruggiero, Messina, Santora, Cerasani and Piteo.

7. Rabito, Episcopia and Santora.

possession and distribution of methaqualone in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. §2. Count 4 charges three defendants[8] with conspiracy to distribute and to possess with intent to distribute methaqualone in violation of 21 U.S.C. §846. The narcotics charges in counts 3 and 4 form the basis of one narcotics transaction included in the pattern of racketeering in count 1. Thus the crimes charged in counts 2, 3 and 4 all relate to the criminal activity charged in count 1. As more fully set forth below, the charge that each defendant conspired to participate in diverse criminal activities and associated to commit these activities as part of a criminal enterprise is sufficient to deny defendants' motions for severance and separate trials.

In *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981), the Supreme Court delineated the requisites for proving a RICO violation.

> In order to secure a conviction under RICO, the government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. §1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

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8. Rabito, Episcopia and Santora.

In the instant case, the indictment charges the existence of an enterprise, the Bonanno Family of La Cosa Nostra, a group of persons including the defendants, associated together for a common purpose of engaging in a course of conduct. Additionally, the indictment charges a pattern of racketeering, a series of criminal acts engaged in by the defendants. Each defendant is charged with participating in the affairs of the enterprise through a conspiracy involving the commission of at least two predicate criminal acts. *See United States v. Welch*, 656 F.2d 1039, 1050 (5th Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1767, 72 L.Ed.2d 173 (1982); *United States v. Bright*, 630 F.2d 804, 812-13 (5th Cir. 1980). The only relationship which must be established among the predicate acts is that they be conducted on behalf of the same enterprise. *United States v. DePalma*, 461 F.Supp. 778, 782 (S.D.N.Y. 1978), *aff'd sub nom. United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980). The indictment fulfills this requirement in count 1 by naming all the defendants as participants in a conspiracy of the enterprise to engage in a pattern of racketeering. The scheme charged in count 1 provides the nexus linking the activities of the various defendants who are charged in counts 2, 3 and 4.

Defendants challenge joinder under Rules 8 and 14 Fed.R.Crim.P. Both joinder and severance are left to the discretion of the trial court. *United States v. Herrera*, 584 F.2d 1137, 1143 (2d Cir. 1978); *United States v. Moten*, 564 F.2d 620, 628 (2d Cir. 1977), *cert. denied*, 434 U.S. 942, 98 S.Ct. 438, 54 L.Ed.2d 304 (1977).

Rule 8(b) provides for joinder of defendants "if

they are alleged to have participated . . . in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The indictment charges a pattern of racketeering which comprises a "series of acts or transactions" under Rule 8(b). Acts arising out of a common scheme or plan, or for present purposes on behalf of the enterprise, may be joined. *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980); *United States v. Ricco*, 549 F.2d 264, 271 (2d Cir.), *cert. denied*, 431 U.S. 905, 97 S.Ct. 1697, 52 L.Ed.2d 389 (1977); *United States v. Clemente*, 494 F.Supp. 1310, 1324 (S.D.N.Y. 1980).

As mentioned above, all defendants are charged in count 1; six defendants are charged in count 2 with violations which stem from the conspiracy described in count 1; three defendants are charged in counts 3 and 4 with violations which relate to counts 1 and 2. Rule 8 does not require all defendants to be charged in all counts of the indictment. *United States v. Barton*, 647 F.2d 224, 239-40 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981). Joinder is proper when as here all defendants are alleged to have participated in an overall scheme as associates in a criminal enterprise. *Id.; see United States v. Borelli*, 336 F.2d 376, 387 (2d Cir. 1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Thus Rule 8 joinder requirements have been satisfied.

Finally the defendants argue that they will be

prejudiced by joinder of offenses and seek severance pursuant to Rule 14 Fed.R.Crim.P. However, the Second Circuit has held that "[p]ersons accused in one indictment of joint participation in a crime are normally tried together, absent a showing of substantial prejudice, as to which the defendants bear a heavy burden." *United States v. Lord,* 565 F.2d 831, 839 (2d Cir. 1977); *see United States v. Rucker,* 586 P.2d 899, 908 (2d Cir. 1978). The burden is not met by showing that defendants "might have had a better chance of acquittal by being separately tried." *United States v. Cassino,* 467 F.2d 610, 623 & nn. 37-39 (2d Cir. 1972), *cert. denied,* 410 U.S. 913, 93 S.Ct. 957, 35 L.Ed.2d 276 (1973).

The defendants argue that there is substantial risk that the jury may become confused and draw an improper inference that evidence admitted against one defendant supports a finding of guilt against another. However, separate trials are not required when evidence may be admissible against one defendant but not against others. *United States v. Rucker,* 586 P.2d at 902; *United States v. Petrone,* 499 F.Supp. 29, 33 (S.D.N.Y. 1980). Additionally, when the crime involves a scheme, plan or enterprise, joint trials are appropriate. *See United States v. Girard,* 601 F.2d 69, 72 (2d Cir.), *cert. denied,* 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979).

Differences as to nature, degree and quantity of evidence do not preclude a joint trial. *United States v. Aloi,* 511 F.2d 585, 598 (2d Cir.), *cert. denied,* 423 U.S. 1015, 96 S.Ct. 447, 46 L.Ed.2d 386 (1975); *see United States v. Lyles,* 593 F.2d 182, 191-92 (2d Cir.), *cert. denied,* 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1979). The evidentiary spillover which concerns

the defendants will be avoided by this court's instructions to the jury. *United States v. Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975); *United States v. Moten*, 564 F.2d at 628. This court is not faced with the situation existing in *United States v. Kelly*, 349 F.2d 720, 726, 758-59 (2d Cir. 1965), in which the government introduced co-defendants' post-conspiracy testimony and letter against a third defendant. The court ruled that the introduction of hearsay evidence against the third defendant mandated severance at that time. Defendants' reliance on *Kelly* is misplaced.

Moreover, the defendants' allegations of prejudice must be balanced "against the prejudice to the public interest caused by the time, expense, delay, and duplication of trials."[9] *United States v. Aloi*, 449 F.Supp. 698, 746 (E.D.N.Y. 1977). The defendants have demonstrated no prejudice beyond that which is inevitably present when a serious charge of criminal activity is made against a number of defendants. Such a showing does not meet the Rule 14 requirements.[10] Therefore, this court concludes that the defendants have not met their burden of showing substantial prejudice. The motion to sever is denied.

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9. Five defendants have specifically raised this issue. Others have joined in the motion. The time, expense, delay and duplication involved in separate trials outweighs the allegation of prejudice to the defendants.

10. Joinder which may otherwise be inappropriate is permissible when all defendants are joined in an enterprise under RICO. *United States v. Welch*, 656 F.2d 1039, 1050 (5th Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1767, 72 L.Ed.2d 173 (1982).

Surplusage

Defendants move pursuant to Rule 7(d), Fed.R.Crim.P. to strike references in paragraphs 1 and 2 of the indictment to "Bonanno Family," "La Cosa Nostra," "Boss," "Crews," "Capodecino," "Sister of the Shah of Iran," as surplusage. The motion is denied as to each word.

A motion to strike surplusage is granted only where it is clear that the allegations are not relevant to the crime charged and are inflammatory and prejudicial. *United States v. Claytor,* 52 F.R.D. 360, 361 (S.D.N.Y. 1971); *United States v. Pilnick,* 267 F.Supp. 791, 802 (S.D.N.Y. 1967); *United States v. Klein,* 124 F.Supp. 476, 479-80 (S.D.N.Y. 1954); *see* Fed.R. Crim.P. 7, Notes of the Advisory Committee. Since the standard for surplusage is exacting, only rarely is alleged surplusage stricken from the grand jury indictment. 1 Wright, Federal Practice and Procedure §127, at 278 n. 15 (1969); *see United States v. DePalma,* 461 F.Supp. at 797.

The determinative question in a motion to strike surplusage is not the potential prejudice, but rather the relevance of the allegation to the crime charged in the indictment. If the evidence of the allegation is admissible and relevant to the charge, then despite prejudice, the language will not be stricken. *United States v. Chas. Pfizer & Co.,* 217 F.Supp. 199, 201 (S.D.N.Y. 1963). In addition, "the government may broadly allege that which it intends to prove and that which under applicable principles of law it may prove." *United States v. DePalma,* 461 F.Supp. at 797; *see United States v. Chovanec,* 467 F.Supp. 41, 46 (S.D.N.Y. 1979).

Defendants claim that the words they challenge are sufficiently prejudicial to be stricken from the indictment. The government alleges that defendants are a group of individuals associated to commit criminal activities, an "enterprise," as defined by 18 U.S.C. §1961(4). The references in the indictment to "the Bonanno Family of La Cosa Nostra" serve to identify the "enterprise" and the means by which its members and associates conduct various criminal activities. The government is entitled to prove that "the Bonanno Family of La Cosa Nostra," the enterprise it has described, exists and that the defendants are associated with it. *See generally United States v. Turkette,* 452 U.S. at 583, 101 S.Ct. at 2528. To buttress its claim of relevance, the government has stated that four defendants named in the indictment specifically referred to La Cosa Nostra on tape. *Cf. United States v. Miller,* 381 F.2d 529, 536 (2d Cir. 1967), *cert. denied,* 392 U.S. 929, 88 S.Ct. 2273, 20 L.Ed. 2d 1387 (1968) (government entitled to use aliases when relevant despite prejudice); *United States v. Ostrer,* 481 F.Supp. 407, 419 (S.D.N.Y. 1979) (same).

Therefore, despite the potential prejudice that may arise from the inclusion in the indictment of "the Bonanno Family of La Cosa Nostra," these words are relevant and will not be stricken from the indictment.

Defendants' requests to strike "Boss," "Crews," and "Capodecino" are also denied. These words are explanatory and tend to clarify the structure of the "enterprise" and the role each defendant allegedly held within the association. *United States v. Archer,* 355 F.Supp. 981, 989 (S.D.N.Y. 1972), *rev'd on other grounds,* 486 F.2d 670 (2d Cir. 1973). These

words are material and relevant.

Santora moved during oral argument, to strike the "Sister of the Shah of Iran" from the indictment on the grounds that the defendants are prejudiced by the identification, that the woman's surname without reference to her relation to the Shah of Iran is sufficient. However, the description of the apartment is relevant to establish the intent of the defendants and the scope of the conspiracy. Given the exacting standard for striking surplusage, *United States v. Chas. Pfizer & Co.*, 217 F.Supp. at 201, these words do not meet the requirements as set down by case law and will not be stricken.

6th Amendment Violations

Piteo moves to suppress statements deliberately elicited from him at the request of the government while Piteo was under indictment and represented by counsel in another criminal case, as a violation of his Fifth and Sixth Amendment rights. The motion is denied.

On September 19, 1980, Piteo was indicted in the Southern District of New York. On October 19, 1980, the government filed a superceding indictment charging Piteo with receiving, transporting and disposing of stolen property and conspiracy. Piteo was tried and convicted by a jury on October 13, 1981 and sentenced on March 22, 1982. On November 25, 1981, after conviction and prior to his sentencing, Piteo made incriminating tape recorded statements to Raymond Wean ("Wean"), a non-indicted co-conspirator in the present case, admitting his involvement in some of the

alleged criminal acts charged in the indictment currently in issue. Piteo seeks to have these statements suppressed.

In moving to suppress the incriminating statements, Piteo relies on *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1963). In *Massiah*, the defendant was indicted for violation of the federal narcotics laws. He retained a lawyer, pleaded not guilty to the charge and posted bail. While on bail, a federal agent succeeded in obtaining incriminating statements made by the defendant which were then used at trial to assist the government in securing a conviction against the defendant on the federal narcotics charge. The Court in *Massiah* held that the government could not introduce a defendant's incriminating statements which were elicited without the presence of counsel after the defendant was indicted. *Id.* at 206, 84 S.Ct. at 1203. However, the court also stated that "it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant has already been indicted." *Id.* at 207, 84 S.Ct. at 1203.

The fact that Piteo was indicted and convicted on one charge does not extend his Sixth Amendment rights for all time to an as yet uncharged indictment. *Massiah* does not mandate suppression of incriminating statements obtained by the government in the absence of counsel at a trial under a subsequent indictment, even though the defendant was represented by counsel in connection with a previous charge. *Id.* at 202-03, 84 S.Ct. at 1200-01, *see United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

Since Piteo was not under indictment for RICO violations when he made the statements at issue, his Sixth Amendment rights as delineated by *Messiah* had not attached, and the statements made to Wean are admissible into evidence in the present action.

Double Jeopardy

Additionally, Piteo moves pursuant to Rule 12 Fed.R.Crim.P. to dismiss the indictment on the ground that prosecution is barred by the double jeopardy clause of the Fifth Amendment. The motion is denied.

After Piteo was convicted in 1981 and before he was sentenced by the Honorable Kevin T. Duffy in 1982, a *Fatico* hearing was conducted. Wean testified about Piteo's involvement in the theft of a truckload of tuna fish and an attempted robbery of the apartment of the sister of the Shah of Iran—activities which form the basis of two predicate acts in counts 1 and 2 of the present indictment. Piteo contends that Judge Duffy considered the testimony concerning Piteo's involvement in the theft of tuna fish and the attempted robbery when he imposed sentence and that therefore the trial and possible sentence on counts 1 and 2 of the present indictment relating to the same acts place him in double jeopardy.

The Fifth Amendment guarantee against double jeopardy "protects against a second prosecution for the *same* offense after acquittal, . . . against a second prosecution for the *same* offense after conviction, . . . [and] against multiple punishments for the *same* offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes

omitted) (emphasis added). Even if evidence of Piteo's commission of theft and attempted robbery influenced Judge Duffy in his decision to impose sentence, the present RICO prosecution of Piteo is not barred by the double jeopardy clause.

In *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 103, 66 L.Ed.2d 38 (1980), the Second Circuit held that prosecution and subsequent consecutive sentences for both a RICO offense and the underlying predicate offenses does not violate the double jeopardy clause. "The purpose of RICO was to establish 'new penal prohibitions, and . . . enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.' " *Id.* (*quoting* Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, *reprinted in* [1970] U.S. Code Cong. & Ad. News, at 1073). In light of this purpose, the Second Circuit concluded that separate convictions and additional sentences were not precluded for a RICO prosecution and an underlying offense. *Id.*, *see United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980).

Thus even assuming that Piteo was sentenced for his involvement in the tuna theft and in the attempted robbery, a conclusion I do not reach, a prosecution alleging a RICO violation having these criminal activities as predicate acts is not barred. Piteo's motion is denied.

Venue

Tomasulo moves for a change of venue to

the Eastern District of New York on the grounds that certain acts including a wiretap order and the evidence obtained from the taped conversations, took place outside the Southern District. The motion is denied.

Rule 18 Fed.R.Crim.P. provides that "prosecution shall be had in a district in which the offense was committed." Rule 21 Fed.R.Crim.P. allows for a change of venue for the convenience of the parties and the witnesses and in the interests of justice. The decision to transfer rests in the discretion of the trial judge. *United States v. Keuylian*, 602 F.2d 1033, 1038 (2d Cir. 1979).

The government alleges that the criminal enterprise which the indictment charges, operated in this district. Under Rule 18, the Southern District of New York is a proper forum. Tomasulo has failed to demonstrate pursuant to Rule 21 that the Southern District is an inconvenient forum for the defendant and his witnesses and that a fair and impartial trial is unobtainable in this district. *United States v. Gruberg*, 493 F.Supp. 234, 242 (S.D.N.Y. 1979). Therefore the motion for a change of venue is denied.

Additionally, Tomasulo moves to dismiss the indictment. For reasons set forth in this court's memorandum opinion dated May 18, 1982, this motion is denied.

Suppression of Address Book

Mulligan moves to suppress the physical evidence obtained from a search of the defendant at the time of his arrest. This motion is denied.

A warrant for Mulligan's arrest was issued on March 25, 1982 in the United States District Court for the Southern District of New York. Mulligan was subsequently placed under arrest at the corner of 77th Street and York Avenue, New York, N.Y., and transported to the Queens office of the F.B.I. At the office he was searched and two address books were removed from his clothing and photocopied.

The Supreme Court has held that once there has been a lawful arrest, a full search of the person detained may be conducted without a warrant, *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 471, 38 L.Ed.2d 427 (1973), and that the search would be valid despite a time lapse between the place of arrest and the subsequent taking of the property at the place of detention. *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974).

Since the arrest gives authority to search, a police officer or agent is entitled to inspect the possessions of the person detained, and if the inspection reveals any information which is of evidentiary significance, he is entitled to seize them as fruits or instrumentalities probative of criminal conduct. *United States v. Robinson*, 414 U.S. at 236, 94 S.Ct. at 477. In *United States v. Frankenberry*, 387 F.2d 337 (2d Cir. 1967), the Second Circuit held that the defendant's diary seized from his clothing in a search incident to his arrest was entirely proper, and that the entries from the diary could be read to the jury.

Mulligan's address book was found in his immediate possession pursuant to a valid search incident to a custodial arrest. Under *Frankenberry*, the motion to suppress the address books obtained from a

search of Mulligan at the time of his arrest is denied.

Suppression of "Consensual" Tape

Mulligan moves to suppress two tape recorded conversations of April 16, 1981, and one videotape recorded conversation of November 24, 1980 on the ground that the recordings violated his expectations of privacy and were taken without the authority of a judicial order. The motion is denied and no hearing will be required.

It is well established that a judicial order is not required for tape recording a conversation when "one of the parties to the communication has given prior consent to such interception." 18 U.S.C. §2511(2)(c); *see United States v. White,* 401 U.S. 745, 753, 91 S.Ct. 1122, 1126, 28 L.Ed.2d 453 (1971). In addition, warrantless recordings of a conversation between a defendant and a government agent or informer who gave consent to the recording, have consistently been admitted into evidence over Fourth Amendment objections.

In *United States v. White,* 401 U.S. at 751-52, 91 S.Ct. at 1126, the Court stated that although a person having a conversation with another regarding criminal activities usually does not expect that person to be a government agent or informer, he has no "justifiable expectation" that the latter may not have consented to a government agent's listening in or making a recording and therefore has no interest protected by the Fourth Amendment.

An agent who conceals his identity may write down his conversation with a defendant and testify

concerning it without a warrant authorizing his communications with the defendant and without violating the defendant's Fourth Amendment rights. *Hoffa v. United States,* 385 U.S. 293, 300-303, 87 S.Ct. 408, 412-14, 17 L.Ed.2d 374 (1966). No different result is reached if the agent simultaneously records the conversation with electronic equipment he is wearing on his person or transmits it to a place where it is recorded by government agents. *Lopez v. United States,* 373 U.S. 427, 439, 83 S.Ct. 1381, 1388, 10 L.Ed.2d 462 (1963).

Mulligan has raised no allegations which amount to an invasion of his constitutionally protected rights. *See Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *United States v. Taborda,* 635 F.2d 131 (2d Cir. 1980). In the instant case, all of the recordings which defendant Mulligan seeks to suppress were made with the consent of a party to conversations. These recordings were not obtained by means of an unlawful physical invasion of the defendant's premises under circumstances which would violate the Fourth Amendment. No facts have been alleged which could give rise to a claim that the videotape constituted an improper invasion of defendants' rights. Consequently, the motion to suppress the tape recorded conversations and videotaped conversation is denied and no hearing on these issues is required.

Pre-Conspiracy Crimes

Mulligan has moved to preclude the government from introducing at trial evidence of a 1969 truck theft to prove an association between Mulligan and Cerasani and any other criminal acts

committed by Mulligan prior to inception of the conspiracy, as charged in the indictment.

*** whether prior crimes are admissible to show an association between Mulligan and other defendants. Admissibility of prior crimes evidence will depend upon whether the prior crimes are relevant to some issue at trial, Fed.R.Evid. 404(b), and whether the probative value of such evidence outweighs its prejudicial value. Fed.R.Evid.403. *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979); *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975). Probative value is dependent on the existence of a "close parallel" between the crime charged and the acts shown. *United States v. Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 93 (1976), including the remoteness of a conviction. *United States v. Corey*, 566 F.2d 429 (2d Cir. 1979).

In *United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980), the Second Circuit has stated that the

> procedure for determining admissibility depends on the grounds on which the government offers the evidence. If the evidence is offered to prove that the defendant committed the act charged in the indictment, for example, by proving identity or common scheme, the evidence may be offered during the prosecution's case-in-chief, unless the defendant's commission of the act is not a disputed issue. On the other hand, if the evidence is offered to prove the defendant's knowledge or intent, the offer of similar acts evidence should await the conclusion of the defendant's case and should be aimed at a specifically identified issue.

Therefore this court will reserve decision on this issue until trial.

Sequestration

The government has moved for an order, pursuant to Rule 7(c) of the Local Criminal Rules, sequestering the jury for the duration of the trial. The motion is denied.

The government's request is based upon the likelihood of substantial prejudicial publicity and the possibility of prejudicial juror contact. Defendants oppose sequestration to exclude significant numbers of those eligible for jury selection.

The decision concerning whether a jury should be sequestered is "entrusted to the sound discretion of the trial judge." *United States v. Johnson,* 584 F.2d 148, 154 (6th Cir. 1978), *cert. denied,* 440 U.S. 918, 99 S.Ct. 1240, 59 L.Ed.2d 469 (1979); *see Holt v. United States,* 218 U.S. 245, 250-51, 31 S.Ct. 2, 5, 54 L.Ed. 1021 (1910). Courts have recognized that "sequestration is one of the most burdensome tools of the many available to assure a fair trial. It neessarily narrows the cross section from which a jury is drawn by eliminating those persons for whom a lockup would be prohibitive." *Mastrian v. McManus,* 554 F.2d 813, 819 (8th Cir.), *cert. denied,* 433 U.S. 913, 97 S.Ct. 2985, 53 L.Ed.2d 1099 (1977); *see United States v. Porcaro,* 648 F.2d 753, 755 (1st Cir. 1981); *United States v. Boffa,* 513 F.Supp. 444, 493 (D.Del.1980). The government as well as defendants, however, "has a substantial interest in having guilt or innocence decided by a jury free from prejudicial influences," *United States v. Haldeman,* 559

F.2d 31, 85 n. 135 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977), and courts have granted sequestration motions despite defense objections. *Id.; Baker v. United States*, 401 F.2d 958, 967-68 (D.C.Cir. 1968); *United States v. Holovachka*, 314 F.2d 345, 351-52 (7th Cir.), *cert. denied*, 374 U.S. 809, 83 S.Ct. 1695, 10 L.Ed.2d 1033 (1963), *but see Reinstein v. Superior Court*, 661 F.2d 255, 256 (1st Cir. 1981), *cert. denied*, 455 U.S. 995, 102 S.Ct. 1625, 71 L.Ed.2d 857 (1982); *In re NBC, Inc.*, 635 F.2d 945, 948 (2d Cir. 1980). In *United States v. Myers*, the trial court denied sequestration because of defendant's objection despite the national publicity involved in ABSCAM. *See* 635 F.2d 932 (2d Cir. 1980).

The purpose of sequestration is "to protect the jury from interference." *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). The government anticipates substantial publicity during the course of a six-week trial and points to the extensive pretrial coverage given to the murders that form the predicate acts of the crimes charged in the indictment. Additionally, the arrests and arraignments of defendants as well as the return of the indictments were fully reported.

When a trial is likely to arouse substantial media coverage and public interest, "the trial judge should be alert to safeguarding the jury from any potential interference with its decision." *United States v. Robinson*, 503 F.2d 208, 215 (7th Cir. 1974), *cert. denied*, 420 U.S. 949, 95 S.Ct. 1333, 43 L.Ed.2d 427 (1975). However, sequestration is but one method to accomplish this goal. The Second Circuit has suggested an alternate procedure in *United States v. Palmieri*, 456 F.2d 9 (2d Cir.), *cert. denied*, 406 U.S.

945, 92 S.Ct. 2054, 32 L.Ed.2d 332 (1972).

> Where juries are not generally sequestered (e.g., Connecticut; the Southern District of New York) and the trial judge can anticipate prejudicial publicity, he might inform the jury of its duty not to read or listen to any story about the trial, tell the jurors on their oath that he will ask them on their oaths the following morning if they have read or listened to any such stories, and then do just that before starting the next day's trial. This can help eliminate the possibility of prejudice.

Id. at 14 n. 3.

Additionally, in *United States v. Persico*, 425 F.2d 1375, 1378-81 (2d Cir.), *cert. denied*, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108 (1970), the Second Circuit approved of the procedure employed by the Hon. John F. Dooling to determine whether banner headlines and extensive radio and television coverage concerning the government's decision to call Joseph Valachi (a reputed Mafia figure and member of La Cosa Nostra) as a witness against defendants, would impede the jurors from giving defendants a fair trial. Judge Dooling determined that even though members of the unsequestered jury read and heard these news reports, the publicity did not prevent a fair trial. The Court of Appeals affirmed. *Id.* at 1382.

Given the anticipated length of the trial (six weeks) during the summer months[11] and the

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11. Because Ruggiero has been in prison since his arrest on the present charges in August 1981, it has been the goal of this court to try this case as swiftly as possible without sacrificing the interests of justice. A postponement to the Fall to suit the summer plans of the prospective jury panel, counsel and court is not warranted.

burdens on jurors and their families during sequestration as well as the difficulty inherent in obtaining a fair cross-section of the community, I conclude that the expected publicity does not warrant sequestration.[12]

Curative instructions will be given to the jury to refrain from reading about, listening to, or reviewing any material about the trial and from discussing the case with anyone. Additionally the procedure announced in *United States v. Palmieri*, 456 F.2d at 14 n. 3, will be followed.

However, the government raises another issue which must be considered. The government alleges that during a previous trial[13] of Cerasani and Mulligan, a juror was approached on behalf of Mulligan and with Cerasani's knowledge by Mulligan's former partner on the New York City Police Department who told the juror that Mulligan "is a very dear friend. I know he didn't do it." This allegation is based on a videotaped conversation, authorized in the investigation leading to the present indictment, which the government contends occurred on November 24, 1980 in Tampa, Florida. (Reel No. 78)

At oral argument, defendants contended that the discussion with the juror referred to on the tape occurred after the trial was completed and that the second

12. This case does not present the situation which existed in *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980), concerning a history of violence requiring all possible safety measures to protect the jury. *Id.* at 134-35 & n. 3.

13. The trial resulted in a hung jury.

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trial resulted in a conviction. The partial transcript submitted by the government does not indicate the time and effect of the conversation with the juror and does not constitute sufficient evidence on which to conclude that sequestration is required in the present case to prevent jury tampering.

Disclosure of Special Agents Identities

The government moves to withhold the true identities of two undercover Special Agents of the Federal Bureau of Investigation ("FBI") and to permit them to testify at trial using the names by which they were known to the defendants during their undercover activities. The motion is denied.

The government has urged that the revelation of their true identities would place the agents and their families in jeopardy, based on the events which are the subject of the indictment and certain informant and undercover information.

The Supreme Court has repeatedly held that the rights of confrontation and cross-examination are fundamental requirements for the protection of defendants in criminal cases. *Kirby v. United States,* 174 U.S. 47, 55, 56, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899) and essential "for the kind of fair trial which is this country's constitutional goal." *Alford v. United States,* 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931); *see Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Cross-examination is the principal way to test the believability and truth of a witnesses' testimony. *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074,

1076, 13 L.Ed.2d 934 (1965). Subject to the trial judge's broad discretion to prevent repetitive and harassing questions, the cross-examiner is not only permitted to delve into the witness' story in order to test the witness' memory and perception, but also has traditionally been allowed to impeach and discredit the witness. This may be done by introducing evidence of prior crimes or by revealing "possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974).

In *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1969), the defendant was denied the right on cross-examination to elicit the true name and address[14] of a crucial prosecution witness testifying under a false name. The Supreme Court overturned the conviction of the defendant and held:

> [W]hen the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Although the witness in *Smith* was not a government agent, this case as well as the cases con-

14. The defendants will not be permitted to elicit the address of the special agents. The inability to acquire an address will not prejudice or prevent the defendants from conducting an investigation of the agents. *United States v. Cavallaro*, 553 F.2d 300, 304 (2d Cir. 1977).

cerning the identities of informants who testify at trial, provide guidance for the issue at bar. There is no fixed rule with respect to disclosure of an informant's true identity. The issue is one that requires a balancing of the public interest in effective law enforcement against the individual's right to prepare his defense. The particular circumstances of each case are considered and the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors are all taken into consideration. *Roviaro v. United States,* 353 U.S. 53, 62, 77 S.Ct. 623, 628-29, 1 L.Ed.2d 639 (1957).

The Supreme Court has held it reversible error to refuse to disclose the identity of an undercover employee who "helped to set up the commission of the crime and was present at its occurrence." *Id.* at 61, 77 S.Ct. at 628. Furthermore, it is settled in the Second Circuit that the identity of an informant must be made known where his story constitutes the essence or core of the evidence brought forth against the defendants. *United States v. Tucker,* 380 F.2d 206, 212 (2d Cir. 1967); *see Mapp v. Warden,* 531 F.2d 1167 (2d Cir.), *cert. denied,* 429 U.S. 982, 97 S.Ct. 498, 50 L.Ed.2d 592 (1976).

In the instant case, two Special Agents of the FBI infiltrated the alleged criminal organization and participated in the investigation for over four years. It is alleged they participated with the defendants in the course of several of the alleged crimes and witnessed criminal acts of the defendants. Their identity as undercover agents and their testimony are highly material. *Roviaro v. United States,* 353 U.S. at 63, 77 S.Ct. at 629.

The government's motion is based on the privilege to withhold from disclosure the identity of people who provide information of violations of law. The purpose of the privilege of non-disclosure recognizes the "obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Id.* at 59, 77 S.Ct. at 627. Here, the Special Agents were employed to infiltrate and investigate the alleged criminal organization and thereby accepted the risks inherent in that position. There is no question but that these agents played a critical role in bringing about the prosecution of the defendants and that their testimony will be of central importance at trial.

If the agents are permitted to testify under false names, prejudice to the defendants would result from the necessary limitation concerning the scope of the cross-examination as to the agent's identity, history and credibility, as well as concerning any investigation of the agents in or out of court. This investigation may produce information which would be important to the jurors, as sole triers of facts and of credibility, to appropriately draw inferences relating to the reliability of the witnesses. *Davis v. Alaska*, 415 U.S. at 316, 94 S.Ct. at 1110. Such a limitation would violate the defendants' constitutional rights. *United States v. Marti*, 421 F.2d 1263, 1265 (2d Cir. 1970).

To allow the agents to use assumed names without divulging this to the jury would permit the jury to assume that the agents' identity and background are unimpeachable. On the other hand, to disclose that the agents are concealing their names might permit the jury to assume, despite any instruc-

tions by the court to the contrary, that any threat to the agents' safety stem from these defendants. *See United States v. Watson*, 599 F.2d 1149, 1158 (2d Cir. 1979). This would violate the defendants' right to a fair trial by an impartial jury and adversely affect the defendants' presumption of innocence.

The defendants seek to evoke the image of a masked witness and procedures of the Star Chamber while denying any risk to agents and proclaiming the efficacy of the witness protection program. The temptation to review that program must be resisted[15] and there can be no question but that these agents were, are and will be at risk. Certainly their performance as set forth by the government establishes their courage, heroism and skill as front line fighters in the war against crime and entitles them to every appropriate protection. This includes the withholding of the location of their homes, family situation, and any additional information which is of tangential relevance and might increase their exposure to risk. The balance between the personal security of the agents and the constitutional rights of the defendant tips in favor of the defendants on the issue of identity and in favor of the witnesses with respect to address and family circumstances. A similar analysis will be used on any additional requests by the government. However, to grant the government's request would deny the courage of the agents and the principles of an open society and the rule of law.

The motion to preclude revelation of the agents' identity is denied.

All counsel are directed to appear at a pretrial conference on Wednesday, July 7, 1982 at 4:30 p.m. in

courtroom 506. Trial will commence on Friday, July 16, 1982 at 9:30 a.m. in courtroom 506.

IT IS SO ORDERED.

ON MOTIONS TO DISMISS AND TO REDUCE BAIL

Defendant Benjamin Ruggiero ("Ruggiero") moves pursuant to 18 U.S.C. §§3161(b), 3162(a)(1) for an order dismissing the indictment against him on the grounds that Ruggiero was not indicted within thirty days of his arrest. The motion is denied. Additionally, Ruggiero's May 3, 1982 application to reduce bail is denied.

The procedural history relevant to this motion starts with the arrest of Ruggiero on August 29, 1981. On September 9, 1981, pursuant to 18 U.S.C. §3161(h)(8), the government applied for and received a thirty day continuance of the date for a preliminary hearing or indictment. The government cited the complex nature of the case, the need to protect an ongoing undercover investigation, and the extensive evidence, including electronic surveillance, which required analysis prior to indictment. On October 8, 1981, the government applied for and received an additional forty-five day delay on essentially the same basis as the initial motion and in addition, on the need to procure grants of immunity from Washington for several grand jury witnesses and to coordinate with investigations in the Southern District of Florida. Ruggiero was indicted on November 23, 1981.

Ruggiero concedes that the factors relied on by the government may in certain circumstances warrant

extensions of time within which to indict. However, he contends that the existence of appropriate reasons for delay cannot form the basis for a continuance when the government causes an arrest to be made for tactical purposes, knowing that the indictment is not contemplated within the statutory period. According to Ruggiero, on the date of his arrest, August 29, 1981, the government knew that it would be impossible to return an indictment within the required thirty days from the date of arrest. Additionally he contends that the decision to arrest was a stratagem designed to create dissention among the potential defendants and to persuade Ruggiero to cooperate with the FBI. Consequently, because of this, Ruggiero asserts that the reasons given by the government concerning an extension of time within which to indict were not a proper basis for a continuance.

The government concedes that it arrested Ruggiero knowing that it would be impossible to indict Ruggiero within thirty days. It also concedes that "[b]efore his arrest, at the time of his arrest, and subsequent to his arrest, Ruggiero was asked if he was willing to cooperate with the government." However, the government denies that the arrest was a tactical maneuver to obtain Ruggiero's cooperation.

According to the government, the decision to arrest Ruggiero was made in order to guarantee his appearance at trial, there being cause to believe that Ruggiero might disappear. Ruggiero had been told that an FBI agent, Donnie Brasco, had infiltrated his activities. Dominick Napolitano ("Napolitano"), an alleged associate of Ruggiero, when given the same information[1] disappeared. Intercepted conversations in-

1. The FBI told Napolitano that Brasco was an agent to warn them not to harm Brasco and to seek his cooperation.

dicated that Napolitano may have been killed by associates in his own crime family, and the FBI received information from a confidential informant Raymond Wean ("Wean") that Ruggiero was about to be murdered and that taped conversations lent support to Wean's information.

Ruggiero challenges the government's claim that the arrest was necessitated by its belief that a threat to his life existed which would cause him to flee. Specifically, he questions the government's reliance on Wean's information, and the corroboration by Cerasani's alleged participation in the murder of Alphonse Indelicato. Ruggiero points to Wean's criminal record and the fact that Cerasani has not been named in the indictment for having participated in any murders. Additionally Ruggiero contends that in the course of the many bail applications, the government had repeatedly claimed that threats against Ruggiero's life had been recorded on tape. Ruggiero points to the disparity between the government's alleged claim and the fact that no tape has been submitted containing a death threat against him.

The government has presented evidence of Wean's reliability as a confidential informant and his report of the murder threat. Moreover, the failure to indict Cerasani does not negate the government's assertion that he participated in the murder of Alphonse Indelicato but rather that the government had insufficient proof to indict him. Additionally, the government asserts that it has never claimed that any threat information was recorded on tape. Finally, Napolitano's disappearance and the similarity between Brasco's relationship with Napolitano and Rug-

giero[2] further support the likelihood that Ruggiero might flee. Moreover, no reported cases have been cited for the proposition that an otherwise valid extension of the time for indictment becomes invalid because the government in its timing of the defendant's arrest sought to maximize the possibility of his cooperation. The motion to dismiss the indictment must turn on the validity of the extensions of the thirty day period as to which no serious attack has been made. The motion must therefore be denied.

Moreover, Ruggiero relies on the same facts in his application to reduce bail. The evidence which supports the government's allegation of a death threat and the concomitant likelihood of flight have been the subject of the prior applications to reduce bail brought by Ruggiero. Nothing has been presented at this time to change my prior rulings on that subject. Indeed, recent death threats soon to be the subject of another opinion merely serve to fortify my previous views.

Ruggiero's motion to dismiss the indictment is denied as is his application to reduce bail.

IT IS SO ORDERED.

ON MOTION TO PROHIBIT TRIAL IN ABSENTIA

Defendant Anthony Rabito ("Rabito") moves to prohibit the government from trying Dominick Napolitano ("Napolitano") and Joseph Messina ("Messina") in absentia. Aside from considerations of

2. Ruggiero and Napolitano are asserted to be responsible for Brasco's introduction to and participation in the activities of the defendants and their associates.

standing which preclude Rabito from raising this motion, the fact is that Napolitano and Messina are not being tried in absentia. All cases cited by Rabito involved situations in which the absent defendants were actually tried in absentia, consequently they are inapplicable. The jury will be instructed to draw no inference from the fact that some defendants who are charged in the indictment are not being tried.

IT IS SO ORDERED.

18 U.S.C. §1962

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class,

and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections 1(a), (b) or (c) of this section.

21 U.S.C. §841

§841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not

more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at

least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provi-

sion of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be

increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

28 U.S.C. §1254

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,

before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.